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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1902.

RANDOLPH & RANDOLPH, Appellants,

vs No. 272.

J. M. SCRUGGS, as Trustee in Bankruptcy of the Langstaff Hardware Company, Appellee.

CERTIFICATE FROM U. S. CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

STATEMENT AND BRIEF FOR APPELLANTS.

WM. M. RANDOLPH,
GEORGE RANDOLPH,
WASSELL RANDOLPH,
Attorneys and Counsel.

PAUL & DOUGLASS, PRINTERS.

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STATEMENT.

The Langstaff Hardware Company was a corporation existing under the laws of Tennessee, and had been carrying on the hardware business, as a merchant, in Memphis. It was chartered under the general act providing for the organization of corporations. (Shannon's Code, Secs. 2025, 2054 and 2447.)

On the 13th day of August, 1900, it made a general assignment, under the laws of the State, conveying all its property to C. W. Griffith, as assignee, for the equal benefit of all its creditors. Griffith, as assignee, qualified by giving the bond and taking the oath prescribed by the

statute of the State, and then took possession of the property assigned, which consisted of a large stock of hardware, located in two different stores occupied by the company, and retained such possession about fourteen days.

Griffith, as assignee, also took possession of the books and papers belonging to the company, and all its other property conveyed by the deed of assignment, so far as he could get possession of the same. He commenced to dispose of the property under and in accordance with the terms of the assignment, and commenced the collection of the debts due the Langstaff Hardware Company, as required by the terms of the assignment. He also commenced the preparation of an inventory of the property assigned, as required by the statute of Tennessee, and had nearly completed the inventory when the possession of the property was taken from him, under the orders of the Referee in Bankruptcy, under a reference to him made by a deputy clerk of the United States District Court for the District of West Tennessee.

The appellants were attorneys at law, practicing in Memphis, and had been for a number of years. The Langstaff Hardware Company, finding itself insolvent, consulted them, as attorneys and counsel, and was advised to make a general assignment. It employed them to prepare the general assignment, and it was prepared, and executed, and filed for record, and recorded in the Register's office of Shelby County. This was done on the 13th day of August, 1900. The assignment provided for the payment of the expenses and compensation of Griffith, as assignee, or trustee, and then contained this provision: that he should pay "reasonable counsel and attorneys' fees for preparing this deed, and for advice and services to be furnished and rendered him in the course of the administration of the trust hereby created."

After the deed of assignment had been made, and Griffith, as assignee, had taken possession of the property assigned, he employed the appellants as attorneys and counsel to advise him with reference to the matters connected with the administration of his trust, and to represent him in any litigation that might become necessary, or be instituted; and for about two weeks, the appellants performed services and gave advice to him, under the employment as such attorneys and counsel.

After the assignment had been made, and Griffith, as assignee, had taken possession, the Barnes Manufacturing Company, and other creditors, filed a bill in the Chancery Court of Shelby County, against the Langstaff Hardware Company, and Griffith, as assignee, attacking the general assignment, and seeking to have the Langstaff Hardware Company wound up in that court, as an insolvent corporation. Griffith, as assignee, employed the appellants to appear in the suit and make defense for him as assignee, and the Langstaff Hardware Company, and they did so. This suit was begun, and the services rendered, before the adjudication of bankruptcy, and a portion of them before any one of the petitions in involuntary bankruptcy had been filed.

On the 23d day of August, 1900, the American Cutlery Company, and others, filed an involuntary petition in bankruptcy, against the Langstaff Hardware Company, and had process issued, but the proceedings under that petition were so defective that the petitioners found it necessary to abandon or dismiss it.

After dismissing the first petition, or abandoning it, the same creditors, on the 27th day of August, 1900, filed a second petition, and process was issued on the second petition, and served. Before any action had been taken under the second petition, the Harriman Hoe & Tool Company,

and others, filed a third petition in involuntary bankruptcy, against the Langstaff Hardware Company. This was done on the 7th day of September, 1900. Griffith, as assignee, was named a defendant to both the first and second petitions in involuntary bankruptcy, but was not named as a defendant to the third.

Griffith, as assignee, employed the appellants as attorneys and counsel, to represent the Langstaff Hardware Company and himself, as assignee and trustee, to defend the three petitions in bankruptcy, and they made defense in each of the cases.

The employment of the appellants, and the performance by them of the services charged for, are not denied, and are proven in the Record. The fees charged for, and in controversy here, are for the services mentioned above, and the amount of them is not in dispute. The ground on which the adjudication of bankruptcy was rested, was that the Langstaff Hardware Company had made a general assignment.

Record, p. 27.

Griffith, as assignee, under the general assignment, was in possession of all the property embraced in the general assignment when the several petitions were filed in involuntary bankruptcy.

On the 28th day of August, 1900—the day after the second petition in involuntary bankruptcy was filed—a petition was filed by the creditors, asking for the appointment of a receiver to take charge of the assets of the Langstaff Hardware Company. On the the same day, a deputy clerk referred the involuntary petition in bankruptcy to R. D. Jordan, the Referee in Bankruptcy. On the 29th day of August, 1900, the Referee in Bankruptcy appointed the appellee here, J. M. Scruggs, receiver of all the property and assets of the Langstaff Hardware Company.

The Referee further directed Griffith, the assignee under the general assignment, to turn over and deliver to Scruggs, as receiver, all such assets and property.

On the 30th day of August, 1900, the Referee in Bankruptcy made another order, stating that Griffith, the assignee, had refused to surrender possession of the properties of the Langstaff Hardware Company to Scruggs, as receiver; and he therefore ordered the marshal to take possession of the same, and deliver them to Scruggs, the receiver. The marshal, accordingly, took possession of the assets and property, and put Griffith out of possession, and put Scruggs, the receiver, in possession.

After the filing of the third involuntary petition by the Harriman Hoe & Tool Company, the Langstaff Hardware Company acknowledged service of a copy of the petition, and waived the time allowed to answer, and agreed that the issues to be made might be tried at once in Court, or before any judge authorized to hear them.

Record, p. 23.

On the same day, it filed its answer to the petition, and admitted the general assignment, and submitted to the Court whether or not such assignment amounted to an act of bankruptcy, and agreed that if it did, that it had been guilty of an act of bankruptcy.

Record, pp. 24-25.

The petition filed by the Harriman Hoe & Tool Company was the first petition filed which had conformed to the requirements of the statute.

Record, pp. 4-5 and 14-17.

On the 27th day of September, 1900, the second involuntary petition filed was heard, and the adjudication made, as already stated, in the form in which it appears in the Record, at pages 26-28.

After the adjudication, on the 13th day of December,

1900, Griffith, as assignee, filed a petition containing a statement of what he had done, and what he had received, and paid out, as assignee under the general assignment, and set out his own claim for compensation for his services as assignee under the general assignment, and also set out the claim of the appellants for compensation for their services, and asked the court to declare the same liens, and order payment of his claim, and also payment of the claim of the appellants for compensation, as counsel and attorneys he had employed, as expenses of the administration.

Record, pp. 28-31.

On the same day, the 13th of December, 1900, the appellants filed their own petition, seting out the facts stated above, and other facts with reference to the performance by them of the services charged for, as counsel and attorneys, and the facts necessary to show their employment, and asked the court to fix the amount due them, and order the payment of it out of the funds of the Langstaff Hardware Company, the bankrupt, and that a lien be declared in their favor therefor.

Record, pp. 31-33.

Proof of the claim, as thus presented, was made, and was not objected to.

Record, p. 33-34.

The trustee in bankruptcy filed exceptions to the claim of the appellants.

Record, pp. 34-35.

The petitioning creditors also filed exceptions, but probably added nothing to the force of the exceptions made by the trustee in bankruptcy.

Record, pp. 36-37.

The Referee in Bankruptcy ordered on the petition of the appellants that they were not entitled to a preference in payment of the sum claimed by them out of the

funds of the bankrupt estate, but were entitled to prove their claim for five hundred ($500.00) dollars, for services rendered in preparing the general assignment. He allowed the claim for that amount as a general claim, entitled to payment *pro rata*, out of the bankrupt estate. He ordered that all other charges made and claimed by the appellants, were not proper charges against the estate of the bankrupt, and dismissed their petition.

Record, p. 38.

Appellants then filed their petition to review the orders and proceedings before the Referee, with reference to their petition and claim.

Record, pp. 39-41.

They then applied for, and obtained, the proper certificate from the Referee in Bankruptcy, to the end that his acts and proceedings might be reviewed by the District Judge, and they have the proper relief. The Referee in Bankruptcy accordingly made a certificate in which he stated the facts, and the proceedings had, and his conclusions, and to the same attached his opinion, for the action of the District Judge.

Record, pp. 41-46.

The District Judge delivered an opinion, appearing in the Record at page 47.

The cause was then heard upon the petition of the appellants, and the petition of Griffith, upon the Record, and upon the petition for review of the action of the Referee which had been certified to the court. The court ordered that the finding and judgment of the Referee upon the petitions and claims of the appellants and of Griffith, respectively, be affirmed, except as to the allowance to the appellants of five hudred ($500.00) dollars as a general claim for preparing the general assignment for the Langstaff Hardware Company, under its employment. This

claim the Districtt Judge disallowed. He then dismissed the petition of the appellants, and also the petition of Griffith, at the cost of each, respectively. An appeal was then granted to the appellants, in open court, from the order or decree thus made, to the Court of Appeals for the Sixth Circuit.

Record, p. 48.

The appeal has been perfected. (Record, pp. 48-52.) And there is an agreement in the Record as to what shall constitute the Record. (Record, pp. 53-55.)

After the case had been heard in the Circuit Court of Appeals for the Sixth Circuit, it was certified here for decision.

BRIEF FOR APPELLANTS, RANDOLPH & RANDOLPH.

The first question certified is: "Is a claim for professional services rendered to a bankrupt corporation in the preparation of a general assignment, valid under the law of Tennessee, entitled to be paid as a preferential claim out of the estate of the corporation in the hands of a trustee in bankruptcy, when the corporation was adjudicated an involuntary bankrupt within four months after the making of the assignment, and the assignment set aside as in contravention of the bankrupt law?"

GENERAL ASSIGNMENT NOT UNLAWFUL.

We understand the court below to agree that the assignment in question, made by the Langstaff Hardware Company, was valid under the law of Tennessee. The

statutes of Tennessee, copied in the appendix to this brief, recognize and give effect to general assignments by a debtor of all his property for the equal benefit of all his creditors and regulate the administration of such assignments, providing for an official trustee who takes an oath and gives a bond prescribed in the statute, and whose compensation is especially provided for.

Under the general law, a corporation chartered for the purpose of trading, may do anything within the scope of its charter, that an individual may do, and with the like effect, even though such corporation is embarrased by debt, or is actually insolvent—if, in fact, it has not committed an overt act of bankruptcy or insolvency.

Graham vs. Railroad Co., 102 U. S., 160-161.
Hollins vs. Brierfield Coal and Iron Co., 150 U. S., 385-386.
McClaren vs. Roller Mill Co., 95 Tenn., 696.
1 Morawetz on Corporations, sec. 336.
2 Morawetz on Corporations, sec. 1010.
Mosby vs. Williamson, 5 Heiskell, 278.
Comfort vs. McTeer, 7 Lea, 660.
Bank vs. L. & M. Co., 91 Tenn., 12.

It is the general law, recognized everywhere, and has been settled in Tennessee for many years, that a trading corporation may make a general assignment of all its property for the equal benefit of all its creditors, just as an individual may do.

2 Kent's Commentaries, *p. 315 and notes.
Burrill on Assignments, (6 ed'n.) sec. 45, and cases referred to.
Waite on Insolvent Corporations, secs. 158-159.
2 Morawetz on Corporations, secs. 802-805, and particularly cases referred to in Note (3) to sec. 803.

Union Bank vs. U. S. Bank, 4 Humph., 370.

Hopkins vs. Gallatin Turnpike Co., 4 Humph., 403.

Cartwright vs. Dickinson, 88 Tenn., 478.

Binder vs. McDonald, 106 Wisconsin, 332.

In addition to all this, it has been settled for many years in Tennessee, that in the case of the insolvency of such a corporation, all its assets, as a matter of law, are a trust fund for the equal benefit of all its creditors, and the officers of the corporation are the trustees of its assets for such purpose, and neither the corporation, nor its officers can make any inconsistent disposition of them.

Shannon's Code, secs. 5187, 6103 and 2071-2073.

Tradesman's Publishing Co. vs. Car Wheel Co., 95 Tenn., 634.

2 Morawetz on Corporations, sec. 787, etc.

The Langstaff Hardware Company was indebted to insolvency, and under the law just stated, in force in the State of Tennessee, its assets were properly distributable among its creditors *pro rata.*

Section 3 of the Bankrupt Law declares: "Any person who owes debts, *except a corporation*, shall be entitled to the benefit of this act as a voluntary bankrupt."

Could the Langstaff Hardware Company have become a voluntary bankrupt, and had done so, it would simply have accomplished by that act, the application of its assets among its creditors *pro rata,* according to their respective debts—the very same thing provided for under the laws of the State of Tennessee.

The act of Congress has not provided what is required of a corporation occupying the position the Langstaff Hardware Company occupied, as just stated. It has said that it shall not become a voluntary bankrupt, under any circumstances. What then was the Langstaff Hardware Company to do?

Under the State law, its officers, as trustees, could have filed a bill in the Chancery Court of Shelby County, for the administration of the corporation as insolvent.

Marr vs. The Bank of West Tennessee, 4 Coldwell, 471.

In this way the jurisdiction of the Bankrupt Court over the corporation and its assets, would have been brought into question, and possibly defeated, or at least embarrassed.

Re Empire Metallic Bedstead Co., 98 Fed. Rep., 981.

Re Harper & Bros., 100 Fed. Rep., 266.

Re Baker-Ricketson Co., 97 Fed. Rep., 489.

The Langstaff Hardware Company had, under the State Law, also, the option to make the general assignment. It was willing its assets should be distributed equally among all its creditors. It could scarcely be said, with any show of reason, that the act of Congress imposed upon it the duty of committing some act subjecting it to an adjudication of involuntary bankruptcy. But suppose it did—what act is it most likely Congress intended to require it to commit?

The statute prescribes five specific acts of involuntary bankruptcy:

(1) Conveying, concealing or removing property, with intent to hinder, delay or defraud creditors.

(2) Conveying property to a creditor by way of preference.

(3) Suffering a creditor to obtain a preference through legal proceedings, while insolvent, and not vacating or discharging such preference.

(4) Having made a general assignment for the benefit of creditors.

(5) Admitting in writing inability to pay debts, and willingness to be adjudged bankrupt on that ground.

Bankrupt Act, sec. 3.

It will not be said that the Langstaff Hardware Company was under any obligation to commit any one of the first three acts of bankruptcy. See: Wilson vs. City Bank, 17 Wallace, 473. As to the fourth and fifth, it does not appear that at the time the necessity for making the choice of modes of disposing of its assets arose, there were the requisite number of creditors representing the requisite amount of debts, who were willing or ready to file the involuntary petition of bankruptcy, or who, even if they had been requested, would have done so. The moment there had been a suspension of business, or a suspension of payments, the probability is that there would have been a race of diligence through the courts by many of the creditors, for the purpose of appropriating the assets to the payment of their respective debts, to the exclusion of the other creditors.

The first three acts of bankruptcy impute legal, if not moral, wrong, or fraud, on the part of the person committing them. And as for the fifth ground, viz; a declaration of willingness to be adjudged bankrupt, because of inability to pay its debts—such declaration would only have authorized the filing of an involuntary petition, and could mean no more than a general assignment. And in the meantime, there could have been no adjudication of bankruptcy, until an involuntary petition had been filed by the requisite number of creditors, and the requisite notices given, and the steps provided for had been taken under the bankrupt law, and the adjudication brought about in the manner there prescribed.

Re Baker-Ricketson Co., 97 Fed. Rep., 489.

Re Bates, 91 Fed. Rep., 625.

Re Marine Mach. and Conveyor Co., 91 Fed. Rep., 630.

Re T. L. Kelly Dry Goods Co., 102 Fed. Rep., 747.
Re Taylor, 102 Fed. Rep., 728.
Re L. Humbert Co., 100 Fed. Rep., 439.

In the meantime, also, there would have been no lawful custodian of the property, except under the laws of the State of Tennessee, making the officers of the corporation in charge of the assets, the trustees of the stockholders and creditors.

It it was the duty, under the circumstances which existed, of the Langstaff Hardware Company, to do what it could to enable its creditors to realize all they could, and with the least risk of loss, out of its assets, it seems to us now, and seemed to us when we were advising and acting in the matter, that the making of the general assignment was the proper thing to do.

Under the State law, the general assignment was a necessity. If an administration of the assets through the bankrupt court was desirable on the part of the requisite number of creditors, the making of such general assignment was itself an act of bankruptcy, and sufficient on which to base an adjudication, and to transfer the administration to the bankrupt court.

If proceedings in bankruptcy were never resorted to, the State law, properly administered under the general assignment, would have accomplished the very same results which could have been accomplished through the adjudication of bankruptcy, and the administration of the assets, in the bankrupt court.

And, on the other hand, nothing was, or could have been done under the general assignment, in accordance with the State laws, which would, in any way, have infringed or impaired the equal distribution of all the assets among all the creditors, or have prevented, or in any way impeded the administration of such assets by and through

the court in bankruptcy, after it had made the adjudication, and appointed the trustee to take possession, and proceed with the administration.

In making the general assignment, the Langstaff Hardware Company accomplished two things—each directly for the benefit and protection of its creditors as a class: (1) It insured, by such general assignment, the equal distribution, *pro rata*, among all its creditors, of all its property. (2) It provided an assignee, or trustee, to administer the property for such equal distribution, under the sanction of the laws of the State—which laws were in substance, so far as the creditors are concerned, exactly the same as the bankrupt law.

The assignee, or trustee, was a public officer. He took an oath of office, and gave a bond, sufficient in every respect to secure the performance of his duties. His administration was to be under the control and direction of the courts of the State, and he was subject to their jurisdiction, for the purposes of the trust imposed upon him.

In the first paragraph of the certificate of the Circuit Court of Appeals, it is said at the close of the sentence, "When the corporation was adjudicated an involuntary bankrupt within four months after the making of the assignment, and the assignment set aside as in contravention of the bankrupt law." The Court of Appeals could not have intended to add anything to the actual adjudication made in the District Court, by saying, "and the assignment set aside as in contravention of the Bankrupt Law." We understand it was simply announcing a conclusion, viz: that the administration of the estate under the general assignment, was set aside, or stopped by the adjudication of bankruptcy, and the assumption of possession and control of the assets by the District Court.

We do not understand that the assignment was set

aside by the adjudication; as a matter of law, and as a matter of fact, no such declaration was made in the order of adjudication. It is in these words:

"Sixth. It appearing to the Court from the answer of the defendant, the Langstaff Hardware Company, filed to the petition known as No. 1947, that it executed a general assignment for the benefit of all of its creditors, and that said assignment purports on its face to be a general assignment. And, it further appearing to the Court from the answer of the defendant, the Langstaff Hardware Company (that it) is willing to be adjudged a bankrupt, if the making of said general assignment is an act of bankruptcy, within the purview and meaning of the bankrupt act; it is, therefore, ordered, adjudged and decreed, that the said Langstaff Hardware Company be, and it is hereby adjudged a bankrupt, under the petition herein, No. 1943, within the true intent and meaning of the act of Congress relating to bankruptcy."

Record, p. 27.

The form of the adjudication, however, is immaterial. As we understand the decisions, it is nothing more than an adjudication of the fact of bankruptcy. The grounds alleged in the petition are immaterial in collateral controversies arising after the adjudication, and are not judgments upon the matters alleged in the petition as grounds of bankruptcy, as against third parties, not before the Court, having an adverse interest.

This was in substance decided in Reed vs. McIntyre, 98 U. S., 511-512.

And see:

Sinsheimer vs. Simonson, 107 Fed. Rep., 903-905.

Leidigh Carriage Co. vs. Stengel, 95 Fed. Rep., 644-645.

It is true that the District Judge said, in his opinion,

delivered preliminarily to the order of the Court, disallowing the claim of the appellant: "That a voluntary general assignment, though free from any fraudulent purpose, if made within four months of the filing of a petition in bankruptcy, is, as a matter of law, a fraud upon the bankrupt act, under section 67e. (*In re* Wm. H. Gray, 3 Am. B. R., 647.) It is clearly an act against national public policy, and services in preparing such an illegal instrument, or in the effort to uphold or execute it, cannot be paid for out of the assets belonging to the bankrupt's estate, and being distributed in a bankruptcy proceeding. To allow compensation for such illegal act would be unsound, and contrary to all analogy. (Gutwillig's Case, 34 C. C. A., 377; *in re* Peter-Paul Book Co., 104 Fed. Rep., 786; Stearns vs. Flick, 103 Fed. Rep., 619.) I conclude there is error in the judgment of the Referee, in so far as he ruled that a fee for preparing the general assignment, was a provable debt of the bankrupt's, and his judgment in this regard is reversed."

Record, p. 47.

We do not understand this opinion of the District Judge, however, to be any part of the adjudication of bankruptcy. And in the judgment disallowing the claim of the appellants, the District Court did nothing more than approve the finding and judgment of the Referee, disallowing their claim, so far as he had disallowed it, and reverse the adjudication of the Referee, so far as he had allowed the claim, as an ordinary debt, and disallow such portion of the claim.

Record, p. 48.

It is difficult to reconcile the declaration of the District Judge, in his opinion, "that a voluntary general assignment, though *free from fraudulent purpose*, as a matter of law, *is a fraud* upon the bankrupt law, sec. 67e,"

with the declaration of the law itself. That section reads as follows: "That all conveyances, transfers, assignments or encumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt, under the provisions of this act, subsequent to the passage of this act, and within four months prior to the filing of the petition, *with the intent and purpose on his part to hinder, delay or defraud his creditors*, or any of them, shall be null and void *as against the creditors* of such debtor, except as to purchasers in good faith and for a present consideration."

It seems to us that a general assignment is just the conveyance the bankrupt law always makes, when it authorizes and establishes an adjudication of bankruptcy, and just such a conveyance as it was enacted to secure. How can it be a fraud in the debtor, *on the bankrupt law*, to do the identical thing the bankrupt law does for him under the same facts and circumstances?

Miller, J., in Haas vs. O'Brien, 66 New York, 602-603.

We separate the administration of the debtor's assets under the general assignment, by and through the assignee provided by it, from the administration of the same assets after the debtor has become bankrupt, by and through the bankrupt court and its officers and agents, under the general assignment and the bankrupt law. The general assignment is but an agreed adjudication of bankruptcy. We claim that, such being the fact, and the equal distribution of the assets being thereby secured, there is no necessity or occasion for annulling or avoiding the conveying part of a general assignment, for the equal benefit of all the creditors, in order to secure the administration of the assigned property by and through the court in bankruptcy, under the bankrupt statute, and that such administration

may just as well be had and carried out through the bankrupt court, upon and because of the general assignment, as upon or after an adjudication of bankruptcy, upon an ordinary petition, and with the like results, and that all the benefits and advantages contemplated by the bankrupt law, will be accomplished. Only displace the assignee or trustee in the general assignment, and substitute the trustee in bankruptcy in his stead, and the administration can proceed under the law

A GENERAL ASSIGNMENT IS NOT PROHIBITED IN THE BANKRUPT LAW, NOR DECLARED TO BE UNLAWFUL.

Nothing in the bankrupt law, in words, declares that any transfer, assignment, or conveyance, made, in fraud of itself, or in violation of its provisions, shall be fraudulent, or shall be void. Such transfers, assignments or conveyances may be void without any declaration to that effect, in the act of Congress, but the point we call attention to, is, that there is in the bankrupt law *no such declaration.* It is true, that law makes a general assignment an act of bankruptcy, but there is nothing in the law prohibiting such an assignment, nor anything in it declaring such an assignment unlawful or void.

The act of Congress, having gone no further than to declare a general assignment an act of bankruptcy, it is not the province of the courts to go beyond that, and add a penalty as a result of what the statute has declared. They cannot interpolate into the statute a provision destroying a general assignment, valid at the common law, or denying it operation, according to its terms and provisions. The general assignment, or what is done under it, or the results of it, do not necessarily conflict with any express provison of the bankrupt law, nor necessarily interfere with the

administration of the bankrupt's estate, through the court in bankruptcy, under such law. Why may not a general assignment be valid, and yet be an act of bankruptcy? Does not the bankrupt act contemplate that it shall be valid?

The Circuit Court of Appeals, in Hanover National Bank vs. First National Bank, 109 Fed. Rep., 422, held:

(1) That while an action cannot be maintained on a contract that is illegal, or against public policy, where both parties are equally culpable, yet a contract in whose consideration and performance, nothing illegal, or against public policy inheres, may be enforced, although it may incidentally aid one in evading or violating a law.

(2) That where a statute commands certain parties to do, or prohibits them from doing, certain acts, and prescribes penalties for their violation of its commands, courts may not inflict other penalties for its violation, upon other parties, not named in the law, by the avoidance of their contract.

See the authorities reviewed in 109 Fed. Rep., 424-427.

Lauter vs. Jarvis-Conklin Mortgage & Trust Co., 85 Fed. Rep., 894; 54 U. S. Apps., 49; 29 C. C. A., 473.

Hamilton vs. Fowler, 99 Fed Rep., 19.

Brooks vs. Martin, 2 Wallace, 70.

Armstrong vs. American Exchange Bank, 133 U. S., 433.

Mayer, Trustee, vs. White, Admr., 24 Howard, 321-322.

McBlair vs. Gibbes, 17 Howard, 232.

Pullman Palace Car Co. vs. Central Tr. Co., 171 U. S., 138.

In Fritts vs. Palmer, 132 U. S., 282, the constitution

and laws of Colorado, forbidding a foreign corporation to purchase, or hold real estate in that State, until it had acquired the right to do business in the mode prescribed, was under consideration. A corporation, not qualified to do business, purchased real estate, and took a deed of conveyance. The court held that as there was no absolute prohibition of foreign corporations to hold real estate in Colorado, that the deed was not necessarily absolutely void, as to all persons, and for every purpose. It held further, that the courts were not authorized to enlarge the penalty prescribed by the constitution and laws of Colorado, by forfeiting the real estate for the benefit of parties claiming under a subsequent deed from the grantor of the foreign corporation. In substance, therefore, the court held that the title to the real estate was in the foreign corporation, or its vendees, under the deed it had taken, although the corporation had not qualified itself as prescribed in the constituton and laws of Colorado, to purchase or hold real estate.

And see the same principle illustrated in:

National Bank vs. Matthews, 98 U. S., 621.

National Bank vs. Whitney, 103 U. S., 99.

National Bank vs. Stewart, 107 U. S., 676.

Thompson vs. St. Nicholas National Bank, 146 U. S., 240.

McBroom vs. Scottish Mortgage Investment Co., 153 U. S., 323-331.

Mr. Loveland says transfers which are deemed fraudulent in bankruptcy, may be classed as follows:

(1) Those which, independently of any legislative system of bankruptcy, would have been fraudulent at common law, or under a statute of frauds. Section 70, Clause 4, Bankrupt Act.

(2) Those which, in the absence of a legislative sys-

tem of bankruptcy, would have been unobjectionable, but are made void by the bankrupt act, as against its manifest policy of equal and speedy distribution.

With reference to this latter class, he says, further, that the bankrupt act provides that transfers made by the bankrupt, within four months before the filing of the petition, shall be void in three classes of cases:

(a) Conveyances and transfers whereby a creditor is enabled to obtain a preference of his claim over the other creditors. Bankrupt Act, sec. 60.

(b) Conveyances and transfers which are intended to hinder, delay or defraud creditors, or any of them.

(c) Conveyances and transfers which are null and void, as against creditors, under the local laws of the several States.

Loveland on Bankruptcy, secs. 157 and 161.

And, in the same connection, Mr. Loveland says, generally, that in order to render a transfer fraudulent under the act, it must fall within the provisions of the bankrupt statute.

Loveland on Bankruptcy, sec. 157. He refers to Tiffany vs. Lucas, 15 Wallace, 410.

It seems to us this is a clear and correct statement of the law, and, if it is, under which one of the divisions mentioned, can authority be found for the position of the District Judge, in this case, "that a voluntary general assignment, though free from any fraudulent purpose, if made within four months of the filing of the petition in bankruptcy, is, as a matter of law, a fraud upon the bankrupt act, clause 67e?"

He has rested his position, as he states it in his opinion, and as must be the fact, upon clause 67e. No other clause of the bankrupt act, unless it be sec. 70 (4), has any application. And the provision last referred to, cer-

tainly adds nothing to what is contained in clause 67e. It is merely a general declaration of what the trustee takes, and is, in substance, the same as the first ground of bankruptcy, as defined in section 3 (1) of the act. Did the District Judge mean only that a general assignment, in excluding administration through the bankruptcy court of the assets assigned under the bankrupt act, operates as a fraud upon the act, or the creditors?

In discussing transfers in fraud of creditors, and the incidental question of what passes to the trustee, Mr. Loveland says: "Fraud is a necessary element to give the trustee in bankruptcy a right of action. Insolvency, of itself, or the fact that the property conveyed constituted more in value than the grantor could rightfully withdraw from the reach of creditors, does not vest such a right of action in the trustee. The statute provides that the transfer shall be made in fraud of his creditors."

Loveland on Bankruptcy, sec. 158. And see sec. 160.

And in another section, where he considers fraudulent transfers, the same author says: "It should be borne in mind that it is the fraudulent intent of the debtor alone that determines whether the act complained of is an act of bankruptcy or not."

Loveland on Bankruptcy, sec. 51.

He refers to:

Re McKibben, Fed. Cases No. 8859, and 12 N. B. R., 97.

Re Drummond, Fed. Cases No. 4093, and 1 N. B. R., 231.

Re Franklin, Fed. Cases No. 5053, and 8 Benedict, 233.

And see:

Tiffany vs. Lucas, 15 Wallace, 410.

Cook vs. Tullis, 18 Wallace, 332.

Clark vs. Iselin, 21 Wallace, 360.

Armstrong vs. Chemical National Bank, 41 Fed. Rep., 234, 238-239.

But, is it true, as the District Judge has announced in his opinion, that "it is clearly an act against national public policy," that is, to say, a general assignment by a debtor, of all his property, for the equal benefit of all his creditors?

The District Judge cites in support of what he says: Gutwillig's case, 34 C. C. A., 377; *re* Peter-Paul Book Co., 104 Fed. Rep., 786; Stearns vs. Flick, 103 Fed. Rep., 919.

Record, p. 47.

He might well have referred to:

Wald vs. Wehl, 6 Fed. Rep., 163, 169.

Re Sievers, 91 Fed. Rep., 366.

Re Romanow, 92 Fed. Rep., 510.

Re Scholtz, 106 Fed. Rep., 834.

All of equal authority, and all holding, as we understand them, the reverse of his declaration.

The District Judge did not go into reasoning on the question, but the Judge in Peter-Paul Book Co., 104 Fed. Rep., 786, did. In his opinion, the reason of the rule that no allowance can be made to an assignee under a general assignment, for services rendered, even though valuable, and for the benefit of the general creditors of the bankrupt's estate, is that such rule is necessary to prevent the injurious duplication of charges against the assets of the bankrupt, and that insolvent debtors should not be invited to make general assignments for the benefit of creditors in order to obtain allowances for favorite assignees, resulting in the duplication of charges.

104 Fed. Rep., 787.

The force, and at the same time the fallacy, of the reason just stated, is beautifully illustrated in the present

case. The involuntary petition was as nearly formal as such a petition can be. The adjudication was had under an admission of the making of the general assignment in the answer of the Langstaff Hardware Company, and a declaration of the willingness to be adjudged bankrupt, if the making of the general assignment constituted an act of bankruptcy.

Record, pp. 24, 25 and 27.

All the charges for services rendered by the appellants, including the preparation of the general assignment, the advice and services to the assignee after it was completed, and he had taken possession, the defense of the suit in the Chancery Court to administer the assets of the corporation, as insolvent, and the defense of the three petitions in involuntary bankruptcy, amount to only eleven hundred and fifty ($1,150.00) dollars.

Record, pp. 31-33, 38, and 43-46.

The Referee in Bankruptcy thought, and reported, that one thousand dollars was an adequate fee to the attorneys for filing the involuntary petition, and procuring the adjudication of bankruptcy. Upon review of this finding, the District Judge held that the sum allowed by the Referee to the attorneys, was "clearly insufficient," and increased the amount to two thousand dollars, and, in doing so, said: "The sum allowed by the Referee is increased to $2,000.00, which I regard as quite reasonable, not to say low, in any just and substantial view that may be taken of this record."

Record, p. 47.

In the Western District of Missouri, the District Court has established a general rule, that, for preparing a petition in involuntary bankruptcy, and superintending the filing thereof, and the issuance of process, and preparing schedules, in case such duty devolves upon the petition-

ing creditors, a fee of not exceeding fifty dollars, in the discretion of the court, where the same is payable out of the estate of the bankrupt, shall be allowed. And that no further fee shall be allowed to such attorney, where there is no contest or trial touching the adjudication of bankruptcy.

There is a further rule, that, in case of an adjudication requiring a trial, before the court or the Referee, the court may allow a reasonable fee for such services in the particular case.

The rule came under review in the case, *re* J. W. Harrison Mercantile Co., 95 Fed. Rep., 123, where the services had ben performed before the rule was adopted. A fee of one hundred dollars was allowed in that case to the attorney of the petitioning creditors—a case of involuntary bankruptcy—payable out of the estate, for their services in preparing and filing the petition.

See what Judge Phillips said, 95 Fed. Rep., 125-126.

In the case, *re* Silverman, 97 Fed. Rep., 325,, Southern District of New York, Judge Brown allowed a fee of seventy-five dollars to the attorneys for the petitioning creditors, for services ending at the first meeting of the creditors, when the trustee was chosen. He said that after the appointment of a trustee, no allowance to petitioners could be made, for attorneys or counsel, upon examinations of the bankrupt, such services being either for the trustee, or the creditors individually.

And Judge Seaman said, *in re* Baker-Ricketson Co., 102 Fed. Rep., 748, that a receiver in bankruptcy will not be allowed to charge the estate for services rendered him by the attorney of either party, during the continuance of such relation, as he is required to stand independently of the parties to the litigation.

102 Fed. Rep., 749-750.

And see, Bosworth vs. St. Louis Terminal Railroad Co., 174 U. S., 182, where the receiver was required personally to pay the costs of an appeal from an order, allowing a claim to be paid out of the funds in his hands, as receiver, made by the court appointing him.

In view of the facts in the Record, it seems to us to be difficult to show that the administration of the assets of an insolvent debtor corporation, through a formal adjudication upon an involuntary petition in bankruptcy by some of its creditors, is more economical, or less calculated unneccessarily, to dissipate the assets of the estate, in the payment of assignee's costs and fees, or his expenses for the services of attorneys, than the ordinary administration by a general assignment, as provided for in the State laws.

We claim that the bankrupt system, as established by the law of 1898, consists of, or may be divided into, two distinct departments—that is to say: (1) Of the provisions defining bankruptcy or insolvency, and declaring the rights, obligations and duties of the various parties concerned—that is to say: the bankrupt, his trustee, his creditors, and third persons having interests, or concerned with the bankruptcy; and (2) The modes of procedure and the means of administering the system—that is to say: the remedy or mode provided to carry those rights, obligations and duties into effect.

EVERY DEBTOR HAS THE INHERENT RIGHT TO TRANSFER TO A TRUSTEE, BY A GENERAL ASSIGNMENT, ALL HIS PROPERTY FOR THE PAYMENT EQUALLY OF ALL HIS DEBTS, AND SUCH GENERAL ASSIGNMENT, IN PASSING THE TITLE TO THE PROPERTY, DOES NOT CONFLICT WITH, NOR INTERFERE WITH THE ADMINISTRATION OF THE BANKRUPT LAW.

In Brooks vs. Marbury, 11 Wheaton, 98, the court

held that the right of a debtor, in an assignment of his property, to *prefer* particular creditors, where no bankrupt law, or other law prohibiting such preference, exists, is not to be questioned.

In Brashear vs. West, 7 Peters, 608, the court held that an assignment by a debtor of all his property, for the benefit of his creditors, is not presumptively fraudulent.

In that case, Chief Justice Marshall said: "That a general assignment of all a man's property is, *per se*, fraudulent, has never been alleged in this country. The right to make it results from that absolute ownership which every man claims over that which is his own."

After noticing that, under certain circumstances, such conveyances may be suspicious, the Chief Justice said further: "But a conveyance of all his property for the payment of his debts, is not of this description. It is not of itself calculated to excite suspicion. Creditors have an equitable claim on all the property of their debtor, *and it is his duty,* as well *as his right,* to devote the whole of it to the satisfaction of their claims. The exercise *of this right* by the honest performance *of this duty,* cannot be deemed a fraud. If *transferring* every part of his property separately to individual creditors in payment of their several debts, would be not only *fair,* but *laudable,* it *cannot be* fraudulent to *transfer* the whole *to trustees for the benefit of all.*"

7 Peters, 614.

The extent to which the courts have gone on this subject is exemplified by the case of the Memphis Savings Bank vs. Houchens, 115 Fed. Rep., 96. There the Court of Appeals for the Eighth Circuit, decided, "That a State statute regulating general assignments is not applicable to an assignment executed outside of the State, merely because it conveys property within the State. And where

such an assignment is in a form valid at the common law, and by the law of the place where made, and where the parties reside, and also in the form prescribed for the conveyance of real estate under the laws of the State, it will be recognized and enforced in such State, under the rule of comity as to real estate there situated, although it does not conform to the requirements of the local law, when no rights of any resident creditor are prejudiced thereby, but the controversy is wholly between non-resident creditors of the assignor, some of whom are attempting to secure a preference by attachment."

And see:

Segnitz vs. Garden City Banking & Trust Co., 107 Wisconsin, 174.

Knower vs. Central National Bank, 124 N. Y., 552.

The Constitution of Tennessee, Section 8, article 1, declares:

"That no man shall be * * disseized of his freehold, liberties, or privileges * * * or in manner * * * deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land."

The fifth amendment to the Constitution of the United States, while not in the same language, probably means substantially the same as the Constitution of Tennessee, just quoted.

In Stratton Claimants vs. Morris Claimants, 89 Tenn., 498, the court, among other things, held that the right to acquire, to hold, to enjoy, to alien, to devise and to transmit property by inheritance to our descendants, in regular order and succession, was enjoyed to the fullness and perfection of absolute right, when the State constitution was framed, and that one object of the constitution was to protect and preserve those rights.

In the later case of The Bank vs. Devine Grocery Co.,

97 Tenn., 603, which involved the validity of a statute forbidding all transfers of property to preferred creditors, or which would have that effect, whether made by solvent or insolvent debtors, the court said: "To take from property its chief element of value, and to deny to the citizen the right to use and transfer it, *in any proper and legal method*, is as much depriving him of his property, as if the property itself were taken."

97 Tenn., 611.

And again, the court in that case said: "These general provisions in respect to the right to own property, equally protect the right to use, enjoy, exchange and transmit it, as held in the Morris case before referred to, and neither can be taken from the citizen by the arbitrary enactment of the legislature."

97 Tenn., 612.

Following out the legitimate results of the principles thus declared, the court held that the statute of Tennessee, which prohibited the transfer by a debtor, whether solvent or insolvent, of his property, to his creditors, with preferences, to secure their debts, was unconstitutional and void.

The general power and right of a State to legislate with reference to property within its limits, whether real or personal, and the supremacy of such legislation as that of a sovereign, except on the few subjects with reference to which State legislation is excluded by the constitution, and except also the cases in which State legislation on a subject necessarily conflicts with the legislation of Congress on the same subject, under specific grants of special powers in the constitution, where such grants of power are not in words, or by necessary construction, exclusive, is now firmly established.

Justice Gray said in the Pullman Car Co. vs. Pennsylvania, 141 U. S., 22: "No general principles of law are

better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State."

Among the particular subjects upon which it has been settled the States may legislate, with the qualifications upon their powers, stated above, are general assignments by resident debtors, for the equal benefit of all their creditors, of all their property within the State. And this Court has gone so far as to hold that the Federal Courts are bound to give effect to, and administer the laws of the State, regulating such general assignments, as the State makes them, and, further, that it is bound by the construction put upon those laws by the courts of the State.

Union Bank vs. Kansas City Bank, 136 U. S., 223.
Smith Middling Purifier Co. vs. McGroarty, 136 U. S., 237.

And see in this connection:

Brown vs. Smart, 145 U. S., 454.
White vs. Cotzhauzen, 129 U. S., 329, and
Preston vs. Spaulding, 120 Ill., 208, there referred to and approved.
Jaffray vs. McGehee, 107 U. S., 361.

Keeping in view the plenary power of the legislatures of the several States to legislate, unless especially restrained by the National Constitution, or that of the particular State, and the absolute want of authority in Congress to legislate at all, unless the power to do so is specifically granted in the Constitution of the United States, it seems, to us, it ought not to be difficult to determine the extent to which the bankrupt law of 1898 has superseded, or displaced the laws of the State of Tennessee providing for, and regulating the administration of general assignments,

in the State, of property locally within the State, whether real or personal.

Thrasher vs. Bentley, 59 New York, 649.

Haas vs. O'Brien, 66 New York, 597.

Bostwick vs. Burnett, 74 New York, 317.

In Reed vs. McIntyre, 98 U. S., 507, Justice Harlan said: "We have often declared that the *pro rata* distribution of the property of the bankrupt was the main purpose of the bankrupt statute."

98 U. S., 512.

In Trimble vs. Woodhead, 102 U. S., 650, the court said: "The primary object of the bankrupt law is to secure the equal distribution of the property of the bankrupt, of every kind, among his creditors. This can only be done through the rights vested in the assignee, and by the faithful discharge of his duties."

In Bank vs. Sherman, 101 U. S., 406, the court said: "In the disposition of property among creditors, equality is equity. It was the genius and purpose of the statute to secure this result as far as possible, from the moment its aid was invoked, whether by debtor or creditor."

The question whether the debtor has the right to make a general assignment, was before the court in Meyer vs. Hellman, 91 U. S., 496. In that case the court said: "The power which every one possesses over his own property would justify any such disposition as did not interfere with the existing rights of others. And an equal distribution by a debtor of his property among his creditors, when unable to meet the demands of all in full, would be deemed not only *a legal proceeding*, but one entitled to *commendation*. Creditors have a right to call for the application of the property of their debtors to the satisfaction of their just demands. But unless there are special circumstances giving priority of right to the demands of one creditor over

another, the rule of equity would require the equal and ratable distribution of the debtor's property for the benefit of all of them. *And so whenever such a voluntary disposition has been voluntarily made by the debtor, the courts in this country have uniformly expressed their approbation of the proceeding.* The hindrance and delay to particular creditors, in their efforts to reach before others, the property of the debtor, that may follow such a conveyance, are regarded as unavoidable incidents to a just and lawful act, which in no respect impair the validity of the transaction. The great object of the bankrupt act, so far as creditors are concerned, is to secure equality of distribution among them, of the property of the bankrupt."

91 U. S., 500-501.

The bankrupt act was in consideration in Meyer vs. Hellman, along with the question of the validity of the general assignment. And in addition to what has been quoted, the court said: "Unless, therefore, a transaction is void against creditors, independently of the provisions of the bankrupt act, its validity is not open to contestation by the assignee, where it took place at the period prescribed by the statute, anterior to the proceedings in bankruptcy. The *assignment* in this case was *not* a proceeding, as already said, *in hostility* to the creditors, but for their benefit. It was not, therefore, *void,* as against them, or even *voidable.*"

91 U. S., 501.

In that case, Justice Field remarked in the course of his opinion, that the counsel for the plaintiffs in error had filed an argument to show that assignments for the benefit of creditors generally, were not opposed to the bankrupt act. He said their argument was that such assignments are only a voluntary execution of what the Bankrupt Court would compel. And as it is not a proceeding, in it-

self, fraudulent, as against creditors, and does not give a preference to one creditor over another, it conflicts with no positive inhibition of the statute. He said there was much force in the position, and that counsel had the support of Justice Nelson in the New York Circuit Court, in Sedgwick vs. Place, 1 N. B. R., 204, and that of Justice Swayne in the Ohio Circuit Court, in Langley vs. Perry, 2 N. B. R., 180.

After having stated what has been said, Justice Field concluded: "Certain it is that such an assignment is not *absolutely void.* And, if *voidable,* it must be because it may be deemed, *perhaps,* necessary for the efficiency of the bankrupt act, that the administration of an insolvent's estate be entrusted to the direction of the District Court, and not left under the control of the appointee of the insolvent."

See Knower vs. Central National Bank, 124 N. Y., 552.

The case of Sedgwick vs. Place decided, as we understand it, that a general assignment under the statute of New York, was good under the bankrupt act of 1867.

See:

1 N. B. R. (2 ed'n.), 673.

And see:

Haas vs. O'Brien, 66 New York, 597.

Bostwick vs. Burnett, 74 New York, 317.

Boese vs. King, 78 N. Y., 471.

Thrasher vs. Bentley, 59 N. Y., 649.

Hawkins Appeal, 34 Conn., 548.

In Langley vs. Perry, it was decided:

(1) That a general assignment was not necessarily a conveyance to hinder, delay or defraud creditors.

(2) That such an assignment was not necessarily a conveyance to defeat the operation of the bankrupt act of 1867, then in force.

(3) That to make a general assignment an act of bankruptcy, it must have been made with an intent to hinder, delay or defraud creditors, under the statute, 13 Elizabeth, or with the intent to defeat the operation of the bankrupt act.

The question, the court said, was one of fact. If the assignment was an honest act, and was not intended either to defraud creditors, or defeat or delay the operation of the bankrupt act, it was good.

In that case, the Ohio statute as to assignments, was in question. The court held that the bankrupt act of 1867 did not suspend the operation of that statute.

See: Langley vs. Perry, 2 N. B. R. (2 ed'n.), 596.

The cases in New York, referred to above, Thrasher vs. Bentley, Haas vs. O'Brien, Boese vs. King, and Bostwick vs. Burnett, were under the bankrupt act of 1867. The cases in Texas, Petty-Joiner-Eubank Co. vs. Cummins, 57 S. W. Rep., 566, and Petty-Joiner-Eubank Co. vs. Cummins, 59 S. W. Rep., 297, were under the act of 1898, and directly in point upon the proposition that a general assignment for the benefit of creditors is valid, except against the administration of the estate in bankruptcy in the Bankrupt Court.

Our position, more fully stated elsewhere, is that there is no necessity or occasion for annulling or avoiding the conveying part of the general assignment of the Langstaff Hardware Company, made for the equal benefit of all its creditors, in order to secure the administration of the property assigned by such assignment, through the court in bankruptcy, under the bankrupt statute, and that such administration may be had and carried out as well, upon and because of the general assignment, as after or upon any other adjudication of bankruptcy. And we think we are supported by what has been said by various judges in the

opinions to be referred to, if not by the express decisions of the courts in the cases.

Haas vs. O'Brien, 66 New York, 597.

Reed vs. McIntyre, 98 U. S., 507, was a contest between a creditor of the bankrupt, claiming under the levy of an execution on a judgment rendered in her favor prior to the bankruptcy, but after a general assignment made by the bankrupt, on the 13th day of March, 1874, when the bankrupt act of 1867 was in force, and the assignee in bankruptcy, after the adjudication of bankruptcy. Mrs. Reed was the creditor, Combs was the assignee in the general assignment, and McIntyre was the assignee in bankruptcy.

On the 31st day of March, after the levy of the execution, an involuntary petition in bankruptcy was filed. The grounds of the petition were, that Shuey, the alleged bankrupt, a merchant, (1) had fraudulently stopped and suspended the payment of his commercial paper, and had not resumed payment. (2) That being insolvent, he had made the assignment to Combs with the intent to hinder, delay and defraud his creditors, which was an act of bankruptcy.

Shuey appeared, and, without admitting or denying the alleged grounds of bankruptcy, consented to an adjudication of bankruptcy, which was made. That order found the facts set forth in the petition to be true. McIntyre was then elected the assignee in bankruptcy of Shuey, and the usual conveyance made him. Under an agreement between the execution creditor, and McIntyre, the assignee in bankruptcy—the assignee under the general assignment seems to have stepped aside—McIntyre, the assignee in bankruptcy, took possession of the property assigned and the property levied on, without prejudice to the rights of the execution creditor to raise any question she could have

raised had the property remained in the custody of the sheriff.

The suit was to determine the relative rights of the execution creditor, and McIntyre, the assignee in bankruptcy, to the property levied on, or its proceeds.

The court held: (1) That under the common law, and although the bankrupt act was in force, Shuey had the right to make the assignment to Combs, and that the assignment could not be impeached simply because it had the effect to prevent Mrs. Reed, by her execution, and the levy of it, from securing priority over all the other creditors. (2) That nothwithstanding the adjudication of bankruptcy was upon the ground that the assignment by Shuey to Combs was with the intent, on the part of Shuey, to hinder, delay, and defraud his creditors, the bankrupt law did not, upon the adjudication of Shuey's bankruptcy, so retroact upon the assignment to Combs, as to render it void *ab initio,* and let in Mrs. Reed's levy of her execution on the goods embraced in the assignment as superior to the assignment.

It is to be observed that the court did not put its decision on the ground that Mrs. Reed's execution, or the levy of it, in any way conflicted with the provisions of the bankrupt law, but, on the contrary, tacitly conceded that such was not the fact.

In the opinion the court fully stated the grounds of its decision. In concluding its opinion, it said: "Even if it were conceded that the assignment to Combs was an act of bankruptcy, upon the ground that it was made with the intent to prevent the property from coming to the assignee in bankruptcy, and from being distributed under the bankrupt act, it was not *invalid,* except with reference to *proceedings* under the bankrupt statute, to be instituted by the bankrupt, or by some creditor, for the purpose of *bring-*

ing the bankrupt's effects *into the bankruptcy court.* (Everett vs. Stone, 3 Story, 446; Dodge vs. Sheldon, 6 Hill (N. Y.), 9; Searman vs. Stoughton, 3 Barbour (N. Y.) Chy., 348; 15 N. B. R., 228, 98 U. S., 513.

In Meyer vs. Hellman, the petition in bankruptcy was not filed until more than four months after the general assignment was made, and the court held: (1) That the validity of the claim of the assignee in bankruptcy depended , as a matter of course, upon the legality of the assignment under the laws of Ohio, and as the bankrupt act did not affect the question, there was no serious doubt as to its legality.

In answer to the argument made that the bankrupt act suspended the operation of the Ohio statute regarding assignments for the benefit of creditors, because such statutes were in substance insolvent laws, the court decided: (2) That such was not the fact.

On this point of the case, Justice Field said: "The answer is that the statute of Ohio is not an insolvent law in any proper sense of the term. It does not compel, or in terms even authorize assignments. It assumes that such instruments were conveyances previously known, and only prescribes a mode by which the trust created shall be enforced. It provides for the security of the creditors by exacting a bond from the trustees for the discharge of their duties. It requires them to file statements, showing what they have done with the property, and affords in various ways the means of compelling them to carry out the purposes of the conveyance. There is nothing in the act resembling an insolvent law. It does not discharge the insolvent from arrest or imprisonment. It leaves his after-acquired property liable to his creditors, precisely as though no assignment had been made. The provisions for enforcing the trust are

substantially such as a court of chancery would apply in the absence of any statutory provision. The assignment in this case must therefore be regarded as though the statute of Ohio, to which reference is made, had no existence."

91 U. S., 502.

Until the decision in Boese vs. King, 108 U. S., 379, it was not settled definitely that a general assignment was an act of bankruptcy, under the bankrupt act of 1867, which contains no express declaration on the subject. But that decision, we understand to have decided the question in the affirmative *definitely*, and to have been considered since as settling the proposition. The case had come from the Court of Appeals of New York, by writ of error, and it is to be found reported in 78 N. Y., 471. The facts are somewhat complicated, and need not be stated for the purposes we have in view here.

The statutes of New Jersey, with respect to general assignments, and the effect of the bankrupt act of Congress of 1867 on those statutes, presented the questions to be decided.

The Supreme Court of New York had ruled that the statutes of New Jersey were in their nature and effect a bankrupt law, and that the bankrupt law of 1867 had superseded their operation, as to all cases within its purview, so that the assignment of Locke, the bankrupt in that case, was not valid for any purpose. The Court of Appeals of New York recognized the paramount nature of the bankrupt law, and assumed that *such portions* of the New Jersey statutes as *were in conflict with* it, were inoperative, and without force. But the Court of Appeals held that, notwithstanding the truth of this proposition, that the *other portions* of those statutes, providing for the equal distribution of the debtor's property

among his creditors, and regulating the general conduct of the assignee or trustee, were *not* inconsistent with, nor necessarily suspended by the bankrupt law. The Court of Appeals held, further, that the New Jersey statutes did not create the right to make voluntary assignments for the equal benefit of creditors, but was only restrictive of a previously existing right, and imposed, for the benefit of creditors, salutary safeguards around its exercise.

And, hence, the court concluded, that had the whole of the New Jersey statutes been superseded, the right of Locke to make the voluntary general assignment would still have existed.

So, the Court of Appeals upheld Locke's assignment as in harmony with the general object and purpose of the bankrupt law, and unassailable merely because some of the provisions of the New Jersey statutes might have been suspended by such law.

This court did not find it necessary to determine the broad question, whether the bankrupt law of 1867 suspended or superseded all the provisions of the New Jersey statute, or did not do so. It said the New Jersey statute was inoperative in providing for the discharge of the debtor from his liability to his creditors, who came in to participate in the distribution of the assigned property. It said, also, in that case, that the assignment by Locke of his entire property, to be disposed of under the New Jersey statutes, and independently of the court in bankruptcy, constituted an act of bankruptcy for which Locke, upon the petition of a creditor in proper time, could have been adjudged a bankrupt, and the property wrested from his assignees *for administration* in the bankrupt court.

The court referred for authority, for the last position, to:

Re Burt, 1 Dillon, 439.

Re Goldscmidt, 3 B. R., 164.

The Matter of Seymour T. Smith, 4 B. R., 377.

In Boese vs. King, the creditors had not resorted to the petition in bankruptcy within the time allowed by the statute, after the general assignment, but had undertaken to avail themselves of the fact that the general assignment was void, and, because it was void, they claimed they had the right as judgment creditors, having fixed a lien, to subject the assets to the payment of their particular debts. Success in their suit would have secured them a preference over all the other creditors, and in order to obtain it, they relied upon the paramount force of the bankrupt law.

In its opinion, the court, as we understand it, decided the following propositions: (a) If the statutes of New Jersey had been wholly suspended when, in 1867, the bankrupt law was enacted, the general assignment of Locke was good as between him and King and others, his assignees, to pass the title to the assigned property from him to them. (b) In the absence of *proceedings* in the court of bankruptcy impeaching the assignment, *and so long* as Locke did not object, the assignees, King and others, had authority *to sell* the assigned property *and distribute* the proceeds among all Locke's creditors, *disregarding* so much of the assignment as required the assignees in the distribution to conform to the New Jersey statute, stated in the opinion.

After saying that the suit had been brought mainly upon the theory that because Locke had erroneously supposed his property could be *administered* under the New Jersey statutes, while the bankrupt law was in force, *the title* to the assigned property *did not pass* for the benefit of his creditors, according to their respective legal rights—the court said in this view it *did not concur.*

The court then said, further: "We are of opinion, that, *except as against proceedings* instituted under the bankrupt act *for the purpose* of securing *the administration* of the property *in the bankruptcy court, the assignment* having been made without intent to hinder, delay or defraud creditors, *was valid,* for at least the purpose *of securing an equal distribution* of the estate among all the creditors of Locke, in proportion to their several demands.

Reed vs. McIntyre, 98 U. S., 507-508.

"And, consequently, we adjudge only that the plaintiff in error is not entitled, *by reason of any conflict* between the local statute and the bankrupt act of 1867, or by force of the before mentioned judgment and the proceeding thereunder, to the possession of the assigned property, or its proceeds, *as against the assignees,* (meaning the assignees under the general assignment), or to a priority of claim for the benefit of Pickhardt and Kutroff (meaning the judgment creditors seeking to enforce the lien) upon such proceeds."

108 U. S., 387.

It is true, as just stated, that, under the bankrupt act of 1867, the making of a general assignment was an act of bankruptcy, though not declared to be so in the act. And it is also true, as we have seen, that the bankrupt law of 1898 expressly declares that the making of a general assignment is an act of bankruptcy. But we do not understand that Congress has done anything more in the act of 1898 than declare what would have been the law in the absence of the express declaration contained in the act. In other words, the express declaration in the act has taken nothing from the force or effect of a general assignment, considered as a conveyance of the title to the assets of the insolvent, and as providing for the equal distribution of such assets among his creditors, and has

added nothing to it, as an act or ground for the adjudication of bankruptcy.

The bankrupt act of 1867, and the construction the court put upon it were the exact equivalent of the bankrupt act of 1898, with the declaration therein that the general assignment is an act of bankruptcy.

This seems to be the view taken by Taft,, Judge, in Simonson vs. Sinsheimer, 95 Fed. Rep., 948, and 37 C. C. A., 337, where it was held that the petitioning creditor was estopped to set up the assignment for the benefit of creditors as a ground for adjudging the assignor a bankrupt, on certain grounds appearing in the report of the case. In that case, Judge Taft said: "The present law declares the assignment for the benefit of creditors to be an act of bankruptcy, but this is only what was uniformly held to be the effect of the act of 1867, and of the English bankrupt laws.

"George M. West Co. vs. Lea, 19 Sup. Ct., 836.

"*In re* Gutwillig, 90 Fed. Rep., 475.

"Under the law of 1867, an assignment for the benefit of creditors *was valid,* if not *impeached by a petition* in bankruptcy within four months after its execution.

"Meyer vs. Hellman, 91 U. S., 496.

"Nothing in the law of 1898 has been called to our attention that will justify a different construction. It is entirely true, as Judge Allen points out, that it would defeat the object of the bankruptcy law to hold that bankruptcy *proceedings* do not supersede and avoid the *proceedings* in the State court under an assignment law. But the estoppel we are considering, if recognized and enforced, does not affect or detract from the paramount character of bankruptcy proceedings, where properly begun, but only prevents the institution of such proceedings by persons who were privy to the act of which they

complain, and on which they found their prayer for an adjudication."

In the case of the Manufacturing Co. vs. Hamilton, 172 Mass., 178, the court held that the insolvent laws of Massachusetts, upon the enactment of the bankrupt law of 1898, were suspended and superseded, so far as to prevent the beginning of insolvent proceedings in the courts of Massachusetts, but did not go any further. And see, National Bank vs. Ware, 95 Maine, 388, and Littlefield vs. Gay, 96 Maine, 422.

In the West Co. vs. Lea, 174 U. S., Justice White referred to the opinion of Brown, Judge, *in re* Gutwillig, 90 Fed. Rep., 475, 478, as containing a lucid exposition of the result of a deed of general assignment, under all our previous bankruptcy acts, and under the English bankrupt laws, and the significant import of the incorporation in the bankrupt act of 1898, of the previous rule, by the express enactment, that the making of a general assignment, for the benefit of his creditors, is an act of bankruptcy on the part of the debtor.

In his opinion, Brown, Judge, among other things, said: "Since the time of George II., and even prior, the current of English adjudications, followed by our own, has been that a voluntary assignment of all his property, by an insolvent debtor to an assignee of his own choosing, though without preferences, is itself an act of bankruptcy, a fraud upon the act, and hence *a fraud* upon the creditors, *as respects their rights in bankruptcy*, and *voidable* at the trustee's option, even without any express provision to that effect in the statute."

90 Fed. Rep., 478.

After referring to cases, he said further: "The general ground upon which all these cases, in the absence of express statutory enactments, have proceeded is that a vol-

untary assignment is, in effect, an act of bankruptcy, and is fraudulent, not at common law, or under 13 Elizabeth, but because it defeats the rights of creditors secured by the bankrupt law *to the choice of a trustee to the summary jurisdiction of the bankruptcy court, and to the ample control which the law intended to give them over the estate of their insolvent debtor,* and is, *therefore,* a fraud upon the act, and upon creditors' rights, *which prevents* the assignee *from holding* the assigned estate, *as against* the trustee in bankruptcy. These general principles, and the decisions enforcing them, are as applicable to the present act, as to the various English bankruptcy statutes, and to our own acts of 1867, 1841 and 1800."

90 Fed. Rep., 478.

In this connection it may be noticed that Judge Brown calls attention to the fact that, while the bankrupt act of 1867 expressly declared the debtor's transfers made "with intent to defeat or delay the provisions of the act" *voidable,* no such provision is contained in the act of 1898, and that, in lieu thereof, the act of 1898 has declared that all liens acquired at law or in equity, within four months prior to the filing of the petition, which are "given or permitted in fraud of the act," are dissolved. And he says this shows the general intent of the act of 1898, in that regard, to be the same as the act of 1867.

90 Fed. Rep., 478-479.

In re Gutwillig, 92 Fed. Rep., 337, the Court of Apeals for the Second Circuit, approved what Judge Brown had said in his opinion, already referred to. Judge Wallace said, in that opinion, that a voluntary general assignment is fraudulent, and intended by the debtor to hinder, delay and defraud his creditors, within the meaning of the bankrupt act of 1898, "because its necessary effect is to defeat the operation of the bankrupt act, and the rights of the

creditors *to such an administration* of the assets as that act is intended to provide."

After approving what Judge Brown had said, he said further: "The general purpose of bankrupt laws, and of the present act, is not only *to administer* the assets of insolvent debtors on the basis of equality, but to secure that result by giving to the creditors, and not to the debtor, *the selection* of the person to be entrusted with *the administration*. To permit *the administration* to be committed by an insolvent debtor, who is on the heels of an adjudication of bankruptcy, to a trustee selected by himself, and thus be wholly withdrawn *from the supervision* of the Bankrupt Court, is irreconcilable with any reasonable view of the purpose of such legislation. Hence, it has been almost uniformly adjudged that any disposition of his property, by a debtor intended to accomplish *that purpose*, is a fraud upon the creditors, who have a right to invoke its protection. That *such disposition* is not one which is fraudulent at common law is immaterial. It suffices if its necessary effect is to defraud, hinder, or delay creditors *in their rights and remedies under the bankrupt law.*"

92 Fed. Rep., 338.

In Davis vs. Bohle, 92 Fed. Rep., 325, the Court of Appeals for the Eighth Circuit, held that, under the bankrupt act of 1898, a general assignment *is voidable* at the instance of creditors, and that if proceedings in bankruptcy are instituted against the debtor assigning, in proper time, and an adjudication procured, *such adjudication avoids* the assignment, and the trustee in bankruptcy may recover the assigned estate, or its proceeds, from the assignee under the general assignment.

In that opinion, Judge Thayer, after referring to the clause of the bankrupt act of 1898 making a general assignment an act of bankruptcy, said: "This was but an-

other form of saying that if a person, subject to the provisions of the act, should make a general assignment, it should entitle his creditors to have him adjudged a bankrupt within four months after the commission of the act, and to have *his estate administered* by a trustee or trustees *of their own selection,* pursuant to the provisions of the act, rather than by the assignee who had been chosen by the insolvent debtor for that purpose."

92 Fed. Rep., 326.

Again, Judge Thayer said: "It was assumed, no doubt, that by declaring a general assignment to be an act of bankruptcy, with all which that declaration implied, the assignee named in such a deed *would take a defeasible title* to the assigned property, which would instantly *fail when* the assignor was adjudged a bankrupt, and that he would *thenceforth be accountable* to the trustee appointed in the bankruptcy proceedings for the assigned property or its proceeds."

92 Fed. Rep., 327.

Further along in the opinion, Judge Thayer said: "We think, therefore, that when Congress declared, as in the recent bankrupt law, that a general assignment for the benefit of creditors should be deemed an act of bankruptcy, it said, in effect, that conveyances of that nature are opposed to the policy of the national bankrupt act, in that they interfere *with the course of administration* which that act contemplates, and tend, in a measure, to defeat its operation, and that creditors of the assignor *shall be entitled to treat* such assignments as void, if, within the period named in the act, they so elect."

92 Fed. Rep., 327-328.

Again, he said: "If it be held that the assignee named in a deed of general assignment is entitled to hold the property committed to his charge, and administer the same

pursuant to local laws, although the assignor is adjudicated a bankrupt, then the singular, not to say absurd, result will follow, that the creditors of the assignor will be deprived of the benefit *of all the provisions* of the national bankrupt act, which relate *to the disposition, control, and management of bankrupt estates.*"

92 Fed. Rep., 328.

And, finally, he said: "We feel confident that Congress did not intend by the recent bankrupt act, to commit *the administration* of any insolvent estate to an assignee *chosen* by the bankrupt, who should be free from *the control of the bankruptcy court* having jurisdiction over the person of the bankrupt, or to deprive the creditors of a bankrupt in any case, of *those rights and remedies* that have been carefully provided by Congress *to secure a faithful, economical and uniform management of bankrupt estates.*"

92 Fed. Rep., 328.

It seems to us that the proposition, that a general assignment is *valid,* generally, and is *voidable* only upon the institution of, and as to proceedings in bankruptcy when instituted, is maintained by the decision of the Court of Appeals of the Sixth Circuit, in Leidigh Carriage Co. vs. Stengel, 95 Fed. Rep., 638.

A paragraph of the syllabus there is: "Where a debtor makes a general assignment for the benefit of creditors, and the assignment is filed in the State court having jurisdiction by the State laws over estates so assigned, and the assignee has taken possession of the assets, and afterwards the assignor is adjudged bankrupt, *the jurisdiction* of the court of bankruptcy is paramount to that of the State court, and the assignee may be enjoined from disposing of the assets of the bankrupt, in his hands, and required to hold the same subject to the orders of the court of bankruptcy."

In delivering the opinion in that case, Taft, Judge, among other things, said: "It is generally true that as between courts of concurrent jurisdiction, the court which first obtains possession of the *res*, must retain possession of it until the *res* has been finally disposed of, and anyone else interested in the *res*, must apply to that court if he desires relief with respect to the property in the possession of that court. But as between district courts, sitting in bankruptcy, and State courts, *for the administration* of insolvent estates, there is no concurrent jurisdiction. The Constitution of the United States, by giving to Congress the power to pass uniform bankruptcy laws, gives to the courts in which Congress shall vest this power, *paramount jurisdiction* in bankruptcy proceedings. The orders in bankruptcy are therefore superior to those of a State insolvency court. Section 720 (Revised Stat. U. S.) which forbids a court of the United States from enjoining proceedings in a State court, expxressly excepts bankruptcy proceedings. This is the plain intimation, by Federal and paramount law, that where a Federal bankruptcy court *shall take jurisdiction*, there the State insolvency court must yield. Hence it is, that *the assignee*, for the benefit of creditors of the defendant company, *the grantee* in the deed which is by the Federal law an act of bankruptcy, may be made a party in the bankruptcy court, and *may be required* to hold the assets of the bankrupt subject to the order of the district court in bankruptcy."

95 Fed. Rep., 645.

In re Plotke, 104 Fed. Rep., 968, the Court of Appeals of the Seventh Circuit referred to Mayer vs. Hellman, and to Simonson vs. Sinsheimer, 95 Fed. Rep., 952, 37 C. C. A., 342, and apparently approved what Judge Taft said in the latter case, already quoted.

We cannot understand Bryan vs. Bernheimer, 181 U.

S., 188, otherwise than as in harmony with the cases we have referred to. It is true that in that case, the court held the general assignment, made by Abraham, to be an act of bankruptcy, but it did not decide that the general assignment was unlawful, or was void, or that Davidson, the assignee under the general assignment, had no title to the property by virtue of the general assignment. On the contrary, it said: "The general assignment made by Abraham to Davidson did not constitute Davidson an assignee for value, but simply made him an agent of Abraham for the distribution of the proceeds of the property among Abraham's creditors."

181 U. S., 192-193.

That is all we contend for in this case. We claim only that the title passed under the general assignment, and remained with Griffith, the assignee of the Langstaff Hardware Company, under the general assignment, until Griffith was displaced by the adjudication of bankruptcy on the involuntary petition, and then upon the appointment of the trustee, in the course of the bankruptcy proceeding, by the United States District Court, vested in him for the purposes declared in the general assignment, which are the identical purposes provided for in the bankrupt law.

The district court had sustained a demurrer to Bernheimer's petition, setting up his purchase from Davidson, the assignee under the general assignment, as against the title of the trustee in bankruptcy, and had held that Bernheimer had no title to the property he had purchased, "superior to the title of the bankrupt estate."

On appeal, the Circuit Court of Appeals reversed the decree of the district court, and recognized, and gave effect to Bernheimer's title as against the trustee in bankruptcy, and ordered the property restored to Bernheimer.

The district court had seized the property of Abraham

summarily, and had required Bernheimer by rule, to propound his claim under the penalty that if he failed to do so, it would decree he had no right.

181 U. S., 194.

Bernheimer appeared in response to the rule, and set up his claim, and asked the district court to adjudicate it, and this court held that such appearance and response amounted to a consent, that the district court exercise jurisdiction of the matter presented, and determine it between Bernheimer and the trustee in bankruptcy.

But there is no intimation in the opinion, anywhere, that we can discover, to the effect that the general assignment by Abraham to Davidson was *illegal*, or absolutely void; or that Davidson, as assignee, or Bernheimer, as his vendee, acquired nothing by the general assignment, or through the sale to Bernheimer, or that either Bernheimer or Davidson was in the attitude of a trespasser or wrongdoer, in holding or dealing with the assigned property. The opinion, as we conceive, implies that the general assignment was voidable only—that Davidson, the assignee, as well as Bernheimer his vendee, had acquired equities, if not rightful claims to the title—and necessarily, that the district court was in error when it summarily ordered Bernheimer "to pay over to the marshal, to await the further order of the court, *all* the proceeds to be ascertained by a referee in bankruptcy of the sales made by him of those goods."

181 U. S., 192.

If this Court had intended to affirm the judgment of the district court as the proper judgment in the case, it would scarcely have sent the case back, after deciding that the district court had jurisdiction, with directions to make Davidson, the assignee in the general assignment, a party, if necessary, and then to settle Bernheimer's equities, and

the rightful claim of the bankrupt's creditors against him, which the Court said, "*might depend upon* many circumstances, and could best be settled when the district court could make a complete determination of the matter."

181 U. S., 198.

If the general assignment of Abraham had been considered as illegal, or as absolutely void, the Court would simply have said so, it seems to us, and have sent the case back, with instructions to the Circuit Court of Appeals to remand the case to the district court, to the end that its judgment might be carried into effect.

The recognition of Bernheimer's equities, in the proposition that he should not "lose, both the goods themselves, and the price which he had paid to Davidson for them," appears to us to be conclusive of what we have just stated.

He had no equities except such as had arisen under his purchase from Davidson, the assignee in the general assignment, whose sole authority, or right to make a sale, depended on the general assignment, and the title he had acquired under it. If that general assignment was *illegal,* and void because *illegal,* the Court would scarcely have recognized any right of either Davidson or Bernheimer under it. It would simply have treated all which had been done as a nullity, and as conferring no right which the Court could take notice of or enforce.

Oscanyan vs. Arms Company, 103 U. S., 261.

McMullen vs. Hoffman, 174 U. S., 640.

Thomas vs. Railroad Company, 101 U. S., 71.

Central Tr. Co. vs. Pullman Car Co., 139 U. S., 24.

We do not deny that the case of Sedgwick vs. Place, 1 N. B. R. (2 ed'n.), p. 673, decided by Justice Nelson, and Langley vs. Perry, 2 N. B. R. (2 ed'n.), p. 596, decided by Justice Swayne, and some of the decisions in the State courts to which we have referred, if they bear an inconsist-

ent construction, must be qualified to the extent that a general assignment is, of itself, an act of bankruptcy, authorizing an adjudication upon an involuntary petition, and that when such adjudication is made, the title to the property embraced by the general assignment, passes from the assignee under the general assignment, to the trustee provided for by the bankrupt law, and that the administration of the property assigned must be exclusively under, and in accordance with, the provisions of that law, and that all jurisdiction over the assigned property of the courts of the several States is ousted, and the administration of it must be by and through the United States District Court, sitting as a court of bankruptcy, *whose jurisdiction* is exclusive *for the purposes of the administration.*

The leading case of the Manufacturing Company vs. Hamilton, 172 Mass., 178, to which we have already referred, does not go any further than our concession, and the cases which have followed it have confined themselves within the same limits.

See:

National Bank vs. Ware, 95 Me., 388.

Littlefield vs. Gay, 96 Me., 422.

Harbaugh vs. Costello, 83 Ill. App., 29, and 184 Ill., 110.

Westcott vs. Berry, 69 New Hamp., 505.

Ketchum vs. McNamara, 72 Conn., 709.

We do not understand any of these cases to hold, or to intimate that a general assignment for the equal benefit of all the creditors of the assignor, is *illegal*, or is necessarily void, *ab initio*, under the bankrupt law.

THE POWER OF CONGRESS TO ESTABLISH LAWS ON THE SUBJECT OF BANKRUPTCIES, DOES NOT EXTEND BEYOND THE ESTABLISHMENT OF LAWS FOR THE DISTRIBUTION OF THE

ASSETS OF INSOLVENT DEBTORS AMONG THEIR CREDITORS.

The language of the Constitution is that: "The Congress shall have the power * * * to establish * * * uniform laws on the subject of banktruptcies throughout the United States."

The only qualification is, that the laws Congress establishes shall be uniform throughout the United States. Its power over the subject of bankruptcy is plenary. The material question is, what "bankruptcy" means, because the power to legislate over the subject cannot extend beyond the subject itself, and Congress cannot extend its legislation beyond "the subject of bankruptcies."

In Sturges vs. Crowninshield, 4 Wheaton, 195, Chief Justice Marshall said, speaking of the distinction between insolvency and bankruptcy: "This difficulty of discriminating with any accuracy between insolvent, and bankrupt laws, would lead to the opinion that a bankrupt law may contain those regulations which are generally found in insolvent laws, and that an insolvent law may contain those which are common to a bankrupt law."

And the Chief Justice said, in the same connection, that bankruptcies and insolvencies are so nearly connected that the one system must almost necessarily embrace features of the other.

And see:

2 Story on the Constitution, secs. 1111-1112.

And Judge Cowen said, in Kunzler vs. Kohaus, 5 Hill (N. Y.), 421, that, "Looking thus at the uniform popular acceptance of the word from the earliest times, and in all English countries, and supposing that to be the true one, I read the Constitution thus: 'Congress shall have the power to establish uniform laws on the subject of any person's general inability to pay his debts, throughout the United States.'"

It is a well known fact that able judges were of the opinion that the bankrupt act of 1841 was unconstitutional. Perhaps the most distinguished instance of such an opinion is to be found in Sackett vs. Andross, 5 Hill (N. Y.), 355, delivered by Judge Bronson. Its erudition and reasoning must command respect, however we may differ from what he said.

Judge Wells, of the District Court of Missouri, was of that opinion. His opinion, in substance, will be found stated in Nelson vs. Carland, by Justice Catron, in his dissenting opinion, 1 Howard, 266.

Justice Catron had endeavored to obtain the decision of the Supreme Court on the question of the uncontitutionality of the act. He and Judge Wells had certified a disagreement, but the court decided that the district judge could not sit in the Circuit Court and join in such a certificate, and therefore dismissed the case for want of jurisdiction.

After that decision had been made, Justice Catron, as associate justice assigned to the Missouri district, delivered his opinion *in re* Edward Klein, to be found in a note to Nelson vs. Carland, 1 Howard (Original Edn.), 277. In that opinion, Justice Catron sustained the constitutionality of the bankrupt act of 1841, and this opinion has always been assumed to have settled the question of the constitutionality of the act of 1841. Perhaps the Supreme Court has never passed on the exact question.

In sustaining the act, in his opinion *in re* Edward Klein, Justice Catron said: "I hold it (the provision in the Constitution of the United States as to bankruptcies) extends to all cases where the law causes to be distributed the property of the debtor among his creditors," meaning, as the context shows, only insolvent debtors.

Judge Story says: "It may be stated that the gen-

eral object of all bankrupt and insolvent laws, is to secure to creditors an appropriation of the property of their debtors *pro tanto*, to the discharge of their debts, whenever the latter are unable to discharge the whole amount.

2 Story on the Constitution, sec. 1106.

And see:

2 Blackstone's Commentaries, *p. 472.

2 Kent's Commentaries, *p. 390.

The most strenuous advocates of a system of national bankruptcy, have never claimed that the grant to Congress in the Constitution, authorized legislation as to debtors generally, or anything more than legislation as to debtors who are insolvent, or bankrupt—that is to say, those whose assets are not sufficient to pay their debts..

If the bankrupt law of 1898 bears the construction given to it in the court below—that is to say, if it has undertaken to deprive all debtors of the power, honestly and in good faith, to assign all their property, voluntarily, for the equal benefit of all their creditors, under such a system, provided by the laws of the State in which they are domiciled, then we should take the position with confidence, that Congress, in passing such portion of the law, has exceeded the power conferred upon it by the Constitution, and that such portion is void.

But we do not understand that Congress, in the law of 1898, has undertaken to do any such thing. On the contrary, we understand that Congress has defined bankruptcy, as it understood the term used in the Constitution, by declaring, in words, what constitutes insolvency, and by confining the cases in which involuntary petitions in bankruptcy may be sustained—except in cases where the debtor makes conveyances, or transfers, or conceals, or removes his property, with intent to hinder, delay or defraud his creditors, or makes a general assignment for the benefit of

his creditors—to those in which insolvency, as defined by it, exists.

Among the definitions, in section 1 (paragraph 15) of the act, it is declared that: "A person shall be deemed insolvent within the provisions of this act, whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

In defining the conveyances, transfers or encumbrances of his property, which are to be void under the act, the insolvency of the debtor when making them, is an essential ingredient.

Sec. 67e of the Law.

And section 19 of the act declares that a person against whom an involuntary petition has been filed, shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as in the act is otherwise provided.

While it is not said in words, the implication is clear, that a verdict for the alleged bankrupt, that he is not insolvent, shall entitle him to a dismissal of the petition.

Mr. Loveland says: "To warrant or justify the institution of involuntary proceedings against a debtor * * * * three things must concur with reference to such debtor: (1) Such debtor must be one who may be adjudged an involuntary bankrupt, and be subject to the provisions, and entitled to the benefits of the statute. (2) He must be insolvent. (3) He must have committed an act of bankruptcy within four months prior to the filing of the petition."

Loveland on Bankruptcy, sec. 67.

In the provision making void preferences given, the insolvency of the debtor at the time of the act done, con-

stituting the preference, is required.

Bankrupt Law, sec. 60.

Mr. Loveland says: "In order to maintain involuntary proceedings against the debtor, he must be insolvent." He refers to sec. 3b of the Bankrupt Act.

Loveland on Bankruptcy, sec. 67.

And treating of preferences created by the debtor, he says: "The debtor must have been insolvent at the time of the transfer."

Loveland on Bankruptcy, sec. 52.

And again, he says, speaking of the debtor's insolvency: "His insolvency in either case may be contested. He is entitled to have a trial by jury in respect to the question of his insolvency, upon filing a written application therefor, at or before the time within which an answer may be filed."

Loveland on Bankruptcy, sec. 67, p. 147.

And treating of the defenses which may be made, he says: "The two principle defenses consist in a denial of insolvency, and that the debtor has committed the act or acts of bankruptcy complained of in the petition."

And, again, in the same connection, he says: "Under the present act, solvency is a complete defense to prevent an adjudication of bankruptcy."

Loveland on Bankruptcy, sec. 83, p. 172.

And in this connection, he refers to section 3c of the bankrupt law. That section provides: "It shall be a complete defense to any proceedings in bankruptcy, instituted under the first subdivision of this section, to allege and prove that the party proceeded against was not insolvent, as defined in this act, at the time of the filing of the petition against him, and if solvency at such date is proved by the alleged bankrupt, the proceeding shall be dismissed."

The act of 1867, establishing a system of bankruptcy, did not define what constituted insolvency.

It was defined by the courts to mean that a debtor could not pay his debts in the ordinary course of business, as men in trade usually do, and such was the conclusion, even though his inability was not so great as to compel him to stop business.

See:

Toof vs. Martin, 13 Wallace, 40.
Wager vs. Hall, 16 Wallace, 584.
Wilson vs. The City Bank, 17 Wallace, 473.
Tiffany vs. Lucas, 15 Wallace, 410.
Sawyer vs. Turpin, 91 U. S., 114.

No doubt the definition of insolvency, as thus established, was one objection to the bankrupt law of 1867, bringing about its repeal. And the limited and guarded definiton of insolvency as contained in the act of 1898 was probably essential to procure its enactment.

In commenting on the differences between the two acts, Mr. Loveland says: "It thus appears (referring to the act of 1898), that a person might not be able to pay his debts as they become due, in the ordinary course of business, and yet be perfectly solvent."

Loveland on Bankruptcy, sec. 194, p. 466.

We do not understand there is anything in West Co. vs. Lea, 174 U. S., 590, conflicting with the position we take. That case dealt simply with the effect of a general assignment as a matter of evidence or proof of the insolvency of the debtor making such assignment. It decided that such a general assignment was conclusive evidence of the fact of the insolvency prescribed in the bankrupt act of 1898, and that evidence to contradict such evidence could not be heard.

The bankrupt act, section 3, in declaring what acts

constitute bankruptcy, expressly declares (paragraph 5) that it is sufficient that the debtor admitted in writing his inability to pay his debts, and his willingness to be adjudged a bankrupt on that ground. The act of Congress treats the debtor as the sole judge of his financial conditon and ability to discharge his debts, for the purposes of the bankrupt act, and makes his declaration conclusive as to his bankruptcy.

And when the court came to put a construction on the preceding clause—that is (4), which declares that making a general assignment for the benefit of his creditors, is an act of bankruptcy, it found and decided that such assignment is, in substance, an admission in writing of his inability to pay his debts, and his willingness to be adjudged a bankrupt on that ground, and, therefore, exactly the same thing as the other clause (5) had in words provided for—and, so, was conclusive of the insolvency of the debtor, and of his liability to be adjudged a bankrupt.

The bankrupt act only authorizes an involuntary petition against a person who is *insolvent*. (Sec. 3b.) And while the act does not state what a voluntary petition shall contain (Sec. 59a), under the authority of section 30, this Court has prescribed Form No. 1, for such a petition, and the form states "that he owes debts which he is unable to pay *in full*, and he is willing to surrender *all* his property for the benefit of his creditors." The schedules and the petition must each be verified by oath (Sec. 7 (8)), and this Court has prescribed the forms of the oaths. The petition and the schedules, so far as concerns a debtor filing a voluntary petition, establish the fact of insolvency for the purposes of an adjudication, and in the view of the bankrupt law, as construed by the courts, he has conclusively admitted all the facts and circumstances constituting legal bankruptcy.

Judge Lowell said, speaking of one who had filed a voluntary petition: "He may be in fact fraudulent and able and unwilling to pay his debts, but the law takes him at his word, and makes effectual provision not only by civil, but even by criminal process, to effectuate his alleged intent of giving up all his property."

In re Fowler, 1 Lowell, 161.

And this Court quoted and approved what Judge Lowell said in Hanover Bank vs. Moyses, 186 U. S., 191.

And the same may be said of a debtor who makes a conveyance or transfer, or conceals, or removes his property with intent to hinder, delay, or defraud his creditors. The bankrupt law conclusively presumes the *insolvency* of such a debtor, and authorizes the adjudication of bankruptcy against him, upon the establishment of the transfer, conveyance, concealment, or removal of his property, with the *intent* to hinder, delay, or defraud his creditors, without reference to his solvency or insolvency, or any inquiry into that fact. If he retain property enough, subject to the payment of his debts, over and above the property transferred, conveyed, concealed or removed, to pay such debts, then *the intent* to hinder, delay, or defraud his creditors, by the transfer, conveyance, concealment, or removal, could not possibly exist. There would be other property with which to pay the debts, and the creditors could not be injured. Hence, the insolvency is a necessary part of the conclusion in every case, where it is found that the conveyance, transfer, concealment, or removal, by the debtor of his property, was made to hinder, delay or defraud his creditors. And the bankrupt law, upon the assumption of this fact, conclusively presumes, without evidence, the fact of insolvency.

STATE LEGISLATION ON THE SUBJECT OF GENERAL ASSIGNMENTS, AND ON THE SUBJECT

OF INSOLVENCIES, ARE ABROGATED OR DISPLACED BY THE BANKRUPT LAW ONLY SO FAR AS THERE IS NECESSARY CONFLICT BETWEEN THE STATE LEGISLATION AND THE BANKRUPT LAW.

The whole extent of the power of Congress to enact bankrupt laws is measured by the language of the Constitution in these words: "The Congress shall have the power * * * to establish a uniform rule of naturalization and uniform laws on the subject of bankruptcy throughout the United States."

Before the adoption of the Constitution of the United States no such thing as a bankrupt law, by that name, had been enacted in any of the American colonies, or States. In England, however, there was a complete system of bankrupt laws, which had existed in some form, for more than two centuries. There was, also, there, another system of laws entirely distinct from the system of bankruptcy, which related exclusively to insolvent debtors. These two systems of laws were not only distinct in their enactment and arrangement, but they applied to different classes of persons and were based upon different ideas or principles.

The bankrupt laws were confined, in their operation, to merchants, traders, and persons who gained their livelihood by buying and selling. The insolvent laws extended to all classes of imprisoned debtors. The bankrupt laws were set in motion by the creditor, and afforded a remedy in his hands for the collection of his debts. But the insolvent laws were set in motion by the debtor, for the purpose of obtaining his enlargement from prison. Under the bankrupt system the debt was discharged or might be. Under the insolvent system the debt was left existing and unimpaired, so far as not paid.

The English bankrupt law, at the date of the American Constitution, did not provide for any case of voluntary bankruptcy. Originally that law permitted no discharge of the debtor from his debts. In later times, however, such discharges were provided for in a qualified form. Before the adoption of the Constitution of the United States, the colonies or States provided insolvent systems by legislative enactment, but in such systems, with perhaps an exception or two, there was no provision for the discharge of the insolvent debtor from his debts, except by the consent of his creditors as a class. There was a statute of New York which did provide for a discharge. But Justice Bronson, in Sackett vs. Andross, 5 Hill (N. Y.), 355, said: "That law, as has already been noticed, was first condemned by the people, then repealed by the legislature, and finally declared unconstitutional by the Supreme Court of the United States."

The first bankrupt law of the United States, that of the year 1800, was framed exclusively on the bankrupt system of England; that is, it was a bankrupt law enacted solely for the benefit of creditors. When the case of Sturges vs. Crowninshield was decided, no system of voluntary bankruptcy had ever been enacted. What the different judges said in that case, in their opinions, was said with reference to the system established by the bankrupt act of 1800. (4 Wheaton, 122.)

The bankrupt act passed by Congress in the year 1841, was the first to introduce into the national legislation the feature of voluntary bankruptcy, and the discharge of the bankrupt, as a necessary consequence of his compliance with the requirements of that law.

The question in the case of Sturges vs. Crowninshield was the validity of the act of the legislature of New York, which not only liberated the person of the debtor from im-

prisonment, but discharged him from all liability on any debt contracted previous to his discharge, on his surrendering his property in the manner prescribed by the act.

The case was before the Supreme Court of the United States, under a certificate of disagreement among the judges in the court below. One of the questions certified was whether after the adoption of the Constitution of the United States, any State had authority to pass a bankrupt law, or whether the power was exclusively vested in Congress.

Another question was, whether the statute of New York was a bankrupt act within the meaning of the Constitution of the United States. The third, and, perhaps, the most material question, was whether the act of the Legislature of New York impaired the obligation of contracts, within the meaning of the Constitution of the United States. The action in that case was in the Circuit Court of Massachusetts. The defendant had made two promissory notes in New York on the 22nd of March, 1811, payable to the plaintiff, and both the notes were to fall due in August 1811. The defendant pleaded his discharge under the New York statute, passed on the 3rd of April, 1811.

The first proposition the Supreme Court decided was, that, since the adoption of the Constitution of the United States, a State has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts, within the meaning of the Constitution (Art. 1, sec. 10), and provided further that there is no act of Congress in force, establishing a uniform system of bankruptcy, *conflicting with such law*. The second proposition decided was that the statute of New York, so far as it attempted to discharge the defendant from the notes, was a law impairing the obligation of contracts, and that the discharge under such statute, was not a good defense, such statute being unconstitutional in the particular stated.

Chief Justice Marshall said, in Sturges vs. Crowninshield (4 Wheaton, 122), that before the Constitution of the United States was adopted, the States respectively had the power to pass bankrupt laws. And, as we understand the decision in that case, the proposition that each State, since the Constitution was adopted, has authority, with the qualifications stated above, to pass a bankrupt law, is based on the principle contained in the tenth amendment to the Constitution of the United States, viz; That the States, or the people of the States have retained all such powers as have not been expressly granted to the United States, or prohibited to the States. The Court held that the power of Congress over the subject of bankruptcy is not exclusive of the power of the States, respectively, and that each State may enact a complete bankrupt system, and its laws on such subject are the law of the land, with the two qualifications, stated above, viz:

(1) That such legislation cannot impair the obligation of contracts; and,

(2) That such laws must give way and yield place where they *necessarily conflict* with the legislation of Congress on the subject. Where there is *no conflict* the State legislation is efficacious and supreme, the same as if Congress had not legislated on the subject of bankruptcy *at all.*

When the case of Ogden vs. Saunders, 12 Wheaton, 213, came before the court, there was much diversity of opinion among the judges. Justice Washington delivered what appears to be the leading opinion. But Judge Story stated in Boyle vs. Zacherie, 6 Peters, 643, that Justice Johnson delivered the opinion, ultimately concurred in by the majority of the justices, and, then said, further, that that opinion "was adopted by the three judges who were in the minority upon the general question of the unconsti-

tutionality of State insolvent laws, so largely discussed in that case."

And see what Chief Justice Marshall said in Boyle vs. Zacherie, 6 Peters, 348; what Chief Justice Taney said in Cook vs. Moffatt, 5 Howard, 310; and what Justice Clifford said in Baldwin vs. Hale, 1 Wallace, 230.

The facts in Ogden vs. Saunders were that Ogden, in the city of New York, where he resided, and was a citizen, had accepted, on the 30th of September, 1806, a bill of exchange, payable at New York, drawn by Jordan, at Lexington, Ky., to the order of Saunders, a citizen of Kentucky. The suit was in the United States District Court for the District of Louisiana.

Ogden pleaded his discharge in insolvency under the act of the Legislature of the State of New York, mentioned above, for the relief of insolvent debtors, by way of defense. The jury found the facts in the form of a special verdict, on which the District Court of Louisiana rendered a judgment for Saunders, and the case was then taken by a writ of error to the Supreme Court of the United States. The case resulted in the decision of two propositions:

(1) An insolvent law of a State does not impair the obligation of future contracts between its own citizens.

(2) But such insolvent laws cannot affect the rights of *creditors*, who are citizens of *other States*.

Recurring to the opinion of Justice Johnson, in discussing the question of the exclusive power of Congress over the subject of bankruptcy, it will be found he said: "There is nothing, which, on the face of the Constitution, bears a semblance of direct prohibition to the States to exercise this power, and it would seem strange, that, if such a prohibition had been in the contemplation of the convention, when appropriating an entire section to the enumeration of prohibitions on the States, they had forgotten this,

if they had intended to enact it." (12 Wheaton, 275.)

And, after reasoning on the subject, Justice Johnson said, further: "For these considerations, I pronounce the exclusive power of Congress over the relief of insolvents untenable, and the dangers apprehended from the contrary doctrine, unreal." (12 Wheaton, 281.)

See: Loveland on Bankruptcy, secs. 9-10, pp. 17-21.

If the statutes of the State of Tennessee, governing general assignments, elsewhere referred to, and copied in the appendix to this brief, could be considered as bankrupt or insolvent laws, and if general assignments for the benefit of creditors in Tennessee, depended for their validity, solely on those statutes, and could not be sustained as valid at the common law, without appealing to the statutes (which, we contend, clearly is *not* the case), still, as we claim, the bankrupt law of 1898, when enacted, and since its enactment, has only rendered those statutes of Tennessee inapplicable, or suspended their force and effect, so far, and so far *only*, as they are in conflict with the express provisions of such bankrupt law, and in other respects, that is where there is no *necessary conflict* in language, or in meaning, or effect, has left such statutes of the State of Tennessee in full force, as laws governing the subject, as they were, and just as they were, before the bankrupt law was enacted by Congress.

We understand such cases as Baldwin vs. Hale, 1 Wallace, 223; Tua vs. Carriere, 117 U. S., 201; Butler vs. Goreley, 146 U. S., 303, to sustain the proposition just stated.

In Denny vs. Bennett, 128 U. S., 497, the court in its opinion quoted from Gilman vs. Lockwood, 4 Wallace, 409, as one of the best statements of the established doctrine, the following: "State legislatures may pass insolvent laws, provided there be no act of Congress establishing a uniform system of bankruptcy, *conflicting* with their pro-

visions, and provided that the law itself be so framed that it does not impair the obligation of contracts. Certificates of discharge, however, granted under such a law, cannot be pleaded in bar of an action brought by a citizen of another State, in the courts of the United States, or of any other State than that where the discharge was obtained, unless it appear that the plaintiff proved his debt against the defendant's estate in insolvency, or in some manner became a party to the proceedings. Insolvent laws of one State, cannot discharge the contracts of citizens of other States, because such laws have no extraterritorial operation, and, consequently, the tribunal sitting under them, unless in cases where a citizen of such other State voluntarily becomes a party to the proceeding, has no jurisdiction of the cause."

In the same case, the court, commenting further, said: "Anyone who will take the trouble to examine all these cases will perceive that the objection to the extraterritorial operation of a State insolvent law is, that it cannot, like a bankrupt law, passed by Congress, under its constitutional grant of power, release all debtors from the obligation of their debts. The *authority* to deal with the property of the debtor *within the State*, so far as it does not impair the obligation of contracts, *is conceded*. But the power to release him, which is one of the usual elements of all bankrupt laws, does not belong to the legislature, where a creditor is not within the control of the court."

In dismissing the case of Brown vs. Smart, 145 U. S., 457, for want of jurisdiction, the court decided two propositions:

(1) That the Maryland law, and the proceedings in insolvency under it, did not impair any right of Brown, the creditor, under the Constitution of the United States.

(2) That the adjudication of the Maryland court, though made without notice to the foreign preferred creditors, and declaring the conveyance for their benefit void, presented no question which could be reviewed by the Supreme Court of the United States. In that case the court said: "But even if it should be held that such a law could not invalidate such a conveyance, so far as citizens of other States are concerned, *it is clearly valid*, so far as it makes the conveyance an act of insolvency, sufficient to support an adjudication of insolvency, and the appointment of a trustee, or an assignee, to take and distribute, among creditors, the property which may lawfully come to his possession. The State might enact *that conveyances*, preferring particular creditors, if made in good faith, *should be valid*, so far as concerned *them*, and *yet provide*, that, so far as *the debtor* was concerned, *the preference* showed such a disregard of the rights of creditors, as would justify *adjudging* the debtor to be insolvent, and appointing a trustee or an assignee *to take possession of, and to distribute* any property not included in the conveyance."

In the case of Geilinger vs. Phillippi, 133 U. S., 257, the court, replying to the position that foreign creditors, not parties to the insolvent proceeding, who came into a court of the United States for relief, were not bound by the proceedings in the State court in insolvency, said: "But, so far as the property of an insolvent is concerned, in the jurisdiction within which proceedings against him are taken, its destination is fixed (existing priorities being of course respected), by the law of that jurisdiction. The insolvency decree is in the nature of an execution, and though it cannot, by its own force, attach assets in another State, it takes the assets within its own. And, while non-resident creditors are entitled to come in, *pari passu*, with domestic, if they do not do so, they cannot participate in the distribution."

In Stewart vs. Platt, 101 U. S., 731, the bankrupt had executed a mortgage, which was held void, *as to the judgment creditors* of the bankrupt, because it had not been filed for record in the proper office, as required by the statute of New York. The court below held that the mortgage was void *as to the assignee in bankruptcy,* on the same ground, and gave him the surplus proceeds of the mortgaged property free from the lien of the mortgage. This Court reversed the judgment, and held that as the mortgage was good *as between* the bankrupt, as mortgagor, and the mortgagee, it was good and effectual also, with respect to such surplus proceeds, *as between* the assignee in bankruptcy, and the mortgagee. 101 U. S., 738-740. See also, Smith vs. The Union Bank, 5 Peters, 518; Cole vs. Cunningham, 133 U. S., 107; Walworth vs. Harris, 129 U. S., 355; Crapo vs. Kelly, 16 Wallace, 610.

In a note to 2 Story on the Constitution, section 1115, the rule is expressed as follows: "The several States have power *to legislate* on the subject of *bankrupt and insolvent laws*, subject, however, to the authority conferred upon Congress by the Constitution to adopt a uniform system of bankruptcy, which authority, when exercised, is paramount; and State enactments *in conflict* with those of Congress upon the same subject, must give way."

In accordance with this principle, our position is, that the legislation of Tennessee, on the subject of general assignments, is displaced or superseded by the bankrupt law of 1898, so far, and so far only, as such laws *necessarily* conflict with the express provisions of the bankrupt law. And that where there is no necessary contradiction, and more particularly where the State laws are identical with the bankrupt law, or accomplish practically and substantially the same objects and purposes, or results, as the bankrupt law, then the laws of Tennessee are

not displaced or superseded, but fix the rights and obligations of the parties concerned, and are to be looked to, and administered by the courts—Federal as well as State—as the laws governing all cases and questions growing out of the acts and conduct regulated by, or embraced within such laws of the State.

We claim that there is no necessity or occasion for annulling or avoiding the conveying part of the general assignment made by the Langstaff Hardware Company, for the equal benefit of all its creditors, in order to secure the administration of the assigned property through the court in bankruptcy, under the bankrupt law, and that such administration, under that law, may be had and carried out, as well upon, and because of the general assignment, and giving it full effect, as after, or upon an adjudication of bankruptcy, and the setting aside of that general assignment, and with the same results, and with all the benefits and advantages, so far as its creditors are concerned, provided for by the bankrupt law.

If anything in the assignment by the Langstaff Hardware Company to Griffith, as trustee or assignee, or in the laws of Tennessee applicable to that assignment, or to the administration of the assets and property covered by, or embraced within it, conflict with or impair the substantial rights or remedies of the creditors of the Langstaff Hardware Company, as conferred in or by the bankrupt law, then such portions of the assignment, and of the laws, were displaced or superseded by the bankrupt law, upon and by the adjudication of bankruptcy.

We are willing to concede that the provisions in the assignment, that Griffith should be the assignee or trustee and that he should hold and administer the assets and property embraced in the assignment, under the authority, and according to directions contained in it, thereby

excluding the jurisdiction of the United States District Court in Bankruptcy, on a proper petition filed by creditors, and an adjudication thereunder, and dispensing with the trustee provided for in the bankrupt law, and with the officers and agencies the bankrupt law creates, and preventing the exercise of the powers, and the application of the remedies existing under that law, come within the concession we have just made.

We, therefore, further agree that such portions of the assignment, and of the laws of Tennessee applicable to it, as so necessarily conflicted with the bankrupt law, and excluded or denied or withheld such substantial rights and remedies, of administration as the creditors are entitled to under the bankrupt law, *but no more*, were displaced and superseded by the bankrupt law, upon the adjudication, and, that the creditors had the right to apply to the court in bankruptcy, and to have the assets and property of the Langstaff Hardware Company, embraced in the assignment, administered there through a trustee, under the terms and provisions of the bankrupt law.

We understand this to be the principle declared in the case of the Manufacturing Co vs. Hamilton, 172 Mass., 178, 51 N. E. Rep., 529. But we do not understand the principle to conflict at all with such cases as Haas vs. O'Brien, 66 N. Y., 597.

Binder vs. McDonald, 106 Wis., 332.

R. H. Herron Co. vs Superior Court, 136 Cal., 279.

Bostwick vs. Burnett, 74 N. Y., 317.

King vs. Boese, 78 N. Y., 471.

Petty-Joiner-Eubank Co. vs. Cummins, 57 S. W. Rep., 566 (Texas).

Petty-Joiner-Eubank Co. vs. Cummins, 59 S. W. Rep., 297 (Texas).

Cook vs. Rogers, 31 Mich., 391.

Beck vs. Parker, 65 Penn. St., 262.
Thrasher vs. Bentley, 69 N. Y., 649.
Hawkins Appeal, 34 Conn., 548.
Geery's Appeal, 43 Conn., 289.
Maltbee vs. Hotchkiss, 38 Conn., 80.

And we understand the position we have taken, as stated above, to be supported by the decisions in Tua vs. Carriere, 117 U. S., 210, and Butler vs. Goreley, 146 U. .S., 303, and Boese vs. King, 108 U. S., 379.

We concede that the administration of the assets of the bankrupt, through the court of bankruptcy, is an essential part of the system of bankruptcy provided by the bankrupt law. But, we utterly deny that it is any *indispensable* part of such system, that the title to the assets to be administered, should pass from the insolvent debtor, solely and exclusively, because of and upon an adjudication, under the provisions of the bankrupt law, and should not as well pass by the voluntary act and agreement of the insolvent debtor himself.

Before the adjudication of the Langstaff Hardware Company as a bankrupt, the general assignment had already accomplished the main purpose of the bankrupt law, viz: it had set apart all the property and assets of that company for the joint and equal benefit of all its creditors.

Conceding the full force and effect of the adjudication of bankruptcy, with respect to such assets, such adjudication accomplished nothing more than the general assignment had already done.

By the express terms of the bankrupt law, the general assignment was an act of bankruptcy, and under the construction put upon the law by the court in the West Company vs. Lea, 174 U. S., 590, the effect of the assignment as an act of bankruptcy, was not subject to dispute—it was conclusive of bankruptcy.

The adjudication of bankruptcy, under the general assignment, was therefore a matter of law, and by relation, took effect from the completion of the general assignment. The court in bankruptcy, therefore, had the right, and was vested with the jurisdiction immediately upon application being made to it by the involuntary petition, to assume control of the assets of the Langstaff Hardware Company, under the general assignment, and proceed with the administration of such assets, based on the general assignment, just as it would have done, could there have been a voluntary petition in bankruptcy by the Langstaff Hardware Company, or as it could, had there been an involuntary petition based on some ground other than a general assignment, and an adjudication of bankruptcy, on such involuntary petition, duly and formally made.

There was no difficulty in the way, and no inconsistency in the course to be pursued, nor any conflict of jurisdiction with any court of the State, and no obstacle preventing the court in bankruptcy assuming the administration of the assets of the Langstaff Hardware Company, at any point of time, *after* the general assignment, and displacing of Griffith, the trustee or assignee, and putting in his place and stead, for the purposes of the administration of the assets transferred, the trustee, and the officers and agents provided for by the bankrupt law, and substituting for the directions and requirements to Griffith, as assignee or trustee, contained in the general assignment, as to the administration of such assets, the directions and requirements prescribed in the bankrupt law for the same purpose.

No provision of the bankrupt law expressly declares a general assignment unlawful or void, or a fraud upon the act, or a fraud upon the creditors of the debtor making it. Congress knew well the construction which had been put

upon the bankrupt act of 1867, by the decisions of this Court and other courts, with reference to general assignments, and if it had intended that the bankrupt act of 1898 should bear a different construction, and that general assignments should be unlawful and entirely prohibited, it certainly would have used language declaring that fact in words whose meaning could not be misunderstood. And this is more especially true of general assignments by commercial corporations. The bankrupt law prohibits such corporations from becoming voluntary bankrupts. Such corporations control, perhaps, the majority of the capital of the United States employed in commercial pursuits. Now, why should such corporations, so situated with reference to the law, *not* make general assignments?

To take the assets in charge as they pass from the assignor by the general assignment, and dispose of them for the equal benefit of all his creditors *pro rata*, as the bankrupt law prescribes, and as the court in bankruptcy may do under its provisions, accomplishes the object of the general assignment, and carries out in substance, exactly the main purpose for which the bankrupt law was enacted.

To express the same idea in different words: Both the general assignment and the bankrupt law devote all the assets of the insolvent debtor to the equal payment of all his debts, and they differ only in the fact that the one is the voluntary act of the debtor, and is carried into effect by an agency created by, and empowered by him, of his own volition, and the other is under a system taking the form of a law, devised and enacted by the national legislature, and is, or may be, carried out, without reference to the concurrence of the debtor, through officers and agents provided for, whose powers and duties are parts of the law. If the ends accomplished are the same, what difference can there be in the methods of accomplishment, either in mor

als or in law? If the creditors get all the debtor's property, both under the general assignment, and as the result of the operation of the bankrupt law, can it be material anywhere, or for any purpose, whether the title to the property passed from the debtor by his voluntary agreement, or because, upon the state of facts which existed, and without reference to any consent on his part, the law transferred such title through the agency of the court in bankruptcy, for the benefit of those creditors?

It is true, the trustee or assignee in the general assignment is ignored or is displaced, and his title is divested out of him, without his consent or concurrence, under our contention or construction, upon the adjudication of bankruptcy against the debtor making the general assignment to him. But this is not a fact of any consequence in determining the effect or operation of the general assignment. The trustee or assignee in such an instrument is a merely formal party. The trust contained in the general assignment is the substance, and the rule is well settled that equity never allows a trust to fail for the want of a trustee. And in the application of this principle, it has frequently occurred that the courts, by construction, or interpretation, or in order to execute the trust, and give it force and effect, have displaced one trustee and substituted another, for the purposes of the trust.

Field vs. Arrowsmith, 3 Humphreys, 442.
Mills vs. Haines, 3 Head, 332.
Hughes vs. Brown, 88 Tenn., 578.
Brennan vs. Wilson, 71 N. Y., 502.
Marks Appeal, 85 Pa. St., 233-234.
Price vs. Parker, 11 Iowa, 144.
Holtoquist vs. Clack, 59 Minn., 59-60.
Brown vs. Parker, 97 Fed. Rep., 447.
Perry on Trusts, secs. 38, 45, 240, 248 and 427.

Burrill on Assignments, sec. 240 (6 ed'n).

The requirement of uniformity in the constitution does not prevent Congress leaving in force State laws on the subject of bankruptcies or insolvencies, or providing for the administration of the bankrupt system it has created through the courts of the several States, or permitting such administration through such courts either wholly, or to any prescribed extent.

The State exemption laws are in words made a part of the bankrupt system. They are "*established*" as a part of it.

Bankrupt Law of 1898, sec. 6.

In Hanover National Bank vs. Moyses, 186 U. S., 181, the court decided the exact proposition, that the bankrupt law of 1898 is not unconstitutional, for want of uniformity, because of its recognition and enforcement of the exemption laws of the several States. And the bankrupt law has omitted any provision giving the trustee in bankruptcy the right to bring actions in any courts of the United States, to recover the assets belonging to the trust, on the ground that he is such trustee. While it has not declared in exact words that his remedy to collect the assets shall be through the courts of the States, the implication is irresistible that Congress intended that the act should be so construed and understood, at least in cases, where, under the general law, no court of the United States has jurisdiction.

In Bardes vs. The Hawarden National Bank, 178 U. S., 524, and Hicks vs. Knost, 178 U. S., 541, this Court held that the trustee of the estate of a bankrupt, appointed under the bankrupt law, has no remedy for a cause of action, belonging to him as such trustee, in the district courts of the United States, except by the consent of his adversary, nor in any other court of the United States, unless he brings himself, or his cause of action within the pro-

visions of the acts of Congress conferring on the courts of the United States, jurisdiction as to causes of action generally. In other cases, his only remedy is in the courts of the States.

Now, why may not the laws of Tennessee, having reference to general assignments, so far as they do not necessarily conflict with the bankruptcy law, remain in force under, and consistently with, the bankrupt system, as well as the exemption laws of the State, or the laws giving to suitors generally the right to sue, and recover judgments, in its courts, for causes of action arising under, or regulated by the bankrupt law?

The question presented in Claflin vs. Houseman, 93 U. S., 130, was whether an assignee in bankruptcy, under the bankrupt act of 1867, could sue to recover a debt due him, as assets of the estate, in a State court, and the court held he could, as by the bankrupt act, the jurisdiction of the courts of the United States had not been made exclusive. Incidentally the court held that the acts of Congress, where exclusive jurisdiction of their enforcement is not given to the Federal courts, may be enforced in the courts of the States of competent jurisdiction.

McKenna vs. Simpson, 129 U. S., 506, is to the same effect. But there are authorities to the contrary, and Justice Bradley referred to some of them in 93 U. S., 134-135.

And until the decisions in Bardes vs. Hawarden Bank, and Hicks vs. Knost, some of the State courts of appeal had held that under the bankrupt act of 1898, the courts of the States had no jurisdiction of actions by a trustee in bankruptcy to recover assets belonging to the estate of the bankrupt.

See:

Lyon vs. Clark, 124 Mich., 100.

French vs. R. P. Smith & Sons Co., 81 Minn., 341.

The present rule, we understand, rests on the principle announced in Claflin vs. Houseman, and the provisions contained in secs. 23a and 23b of the bankrupt act, which in substance authorize or permit suits by and against trustees in bankruptcy, in the courts of the several States.

178 U. S., 536-538.

Why does not the rule apply to bankruptcy which has been applied to foreign and interstate commerce?

Until some inconsistent action, in the form of legislation, is taken by Congress in the exercise of its power to regulate foreign and interstate commerce, the legislation of a State, not directed against commerce in any of its regulations, but relating generally to the rights, duties and liabilities of citizens, is of obligatory force within its territorial jursidiction, although it may directly and remotely affect the operations of foreign and interstate commerce, or persons engaged therein.

Cooley vs. Board of Port Wardens, 12 Howard, 299.

Sherlock vs. Alling, 93 U. S., 99.

Munn vs. Illinois, 94 U. S., 113.

Peik vs. C. & C. R. R. Co., 94 U. S., 164.

Mobile County vs. Kimball, 102 U. S., 691.

EVEN IF THE GENERAL ASSIGNMENT OF THE LANGSTAFF HARDWARE COMPANY IS ADJUDICATED TO HAVE BEEN VOID, AND IS SET ASIDE, THE APPELLANTS ARE ENTITLED TO COMPENSATION FOR THEIR SERVICES.

We have endeavored to show that the general assignment made by the Langstaff Hardware Company to Griffith, as assignee, was not illegal or void, but valid when made, and only voidable upon proceedings in bankruptcy, and that the title to the assigned property passed to Grif-

fith as assignee, and remained in him until the adjudication of bankruptcy against the Langstaff Hardware Company, and that in the meantime, while he had possession under the assignment, he was the lawful custodian of the assets and property assigned to him, and had the duty imposed on him of carrying out the provisions of the assignment, and had all the power and authority necessary to enable him to take care of, and protect, and preserve the property, and also to prosecute and defend such suits as were necessary to sustain, or defend his title, as assignee, and the validity of the deed of assignment, and to incur liabilities in doing so.

But, even if we have failed to maintain the position we have stated, we are still entitled to be paid for our services rendered the Langstaff Hardware Company, and rendered Griffith as assignee, out of the assets or property assigned. It is not disputed that the services were valuable, nor that they were rendered in good faith, nor that the creditors of the Langstaff Hardware Company have had the benefit of them.

This Court, in the case of Williams vs. Gibbes, 20 Howard, 535, decided that where an assignee of a claim on a foreign government, holding it under an assignment, supposed to be good, but afterwards adjudged invalid, prosecuted the claim to a successful result, and was subjected to costs and expenses in protecting the fund from rival claimants, and thereby preserving it, he was entitled to reimbursement of those costs and expenses by the true owner, upon a final settlement of accounts between them. That, being placed in the position of a trustee, it was his duty to defend the title; and the expenses for doing so were properly chargeable to the estate. That the assignee was also entitled to compensation for his trouble and personal exertions in the prosecution of the claim.

And, under the special circumstances of that case, the Circuit Court having allowed thirty-five per cent. of the sum realized, this Court was not prepared to say it was too much, and affirmed the decree.

In that case, the Court of Appeals of Maryland, had decided that the assignee was at no time the true owner of the claim, because the assignment was void; and that decision was conclusive on this Court.

But the fact was, he had possession under the assignment, and the court held he thereby became a trustee, instead of the true owner. In that character, the court also held that he was responsible, after the property came into his hands, for all proper care and management of the same.

It held, further, that in defending the proceeds against suits instituted by third parties, to recover them, he had done no more, nor less than he was bound to do as the proper guardian of the property; and that this was so, even if he had known at the time that the property belonged to the adverse claimant, and had not passed by the assignment. The court said that the services, and the expenses borne, could not have been dispensed with consistently with his duty as trustee.

20 Howard, 537.

The defense was made in that case, that the services had not been rendered for the supposed benefit of the estate, when rendered, but for individual benefit of the assignee, claiming title under the assignment. In response, the court said, that although, in point of fact, the defense had been under the supposition that the property belonged to the assignee under the assignment, yet in judgment of law it was made by him as trustee, and not as owner, as had subsequently been judicially ascertained.

The Court said, further, that as the costs and expenses had been properly incurred in the protection and preser-

vation of the property, it was but just and equitable that they should be made charges upon it.

In this connection it said the misapprehension as to the right could not change the beneficial character of the expenses, when indispensable to the security of the property.

20 Howard, 537-538.

There is a similar case in Tennessee—Douglass vs. The Bank, 97 Tenn., 133. In that case the Supreme Court held that although the assignment was void when made—it, nevertheless, was the duty of the assignee to try and sustain it; and that, if, in doing so, he employed attorneys, and they became entitled to fees for their services in representing him, the fees of such attorneys should be paid out of the property assigned, or its proceeds, as expenses of administration.

The Court said that the case stood upon the very same footing as that of an executor who propounded a will for probate, and was defeated in the attempt to establish it—in which class of cases, it said it was settled that the attorneys' fees were a charge on the property disposed of by the will.

Lassiter vs. Travis, 98 Tennessee, 330, was a case of the application of the principle to an executor who propounded a will, and was unsuccessful. The court held that the nominated executor, who acts in good faith, is entitled to have the costs, and reasonable attorneys' fees incurred by him in an unsuccessful effort to have the will probated, paid out of the assets of the estate, although he was a legatee, and the only person interested in sustaining the will.

And see:

Knower vs. Central National Bank, 124 N. Y., 552.
McBlair vs. Gibbes, 17 Howard, 232.

Williams vs. Gibbes, 17 Howard, 239.

Pullman Car Co. vs Transportation Co., 171 U. S., 138.

THE BANKRUPT LAW AFFIRMATIVELY PROVIDES FOR THE COMPENSATION OF THE APPELLANTS FOR THEIR SERVICES, OUT OF THE ASSETS.

The bankrupt law recognizes the right of an attorney or counselor at law, or solicitor in equity, or proctor in admiralty, to compensation for his services "to be rendered," whether the bankrupt files the petition *voluntarily* for adjudication, or the petition is filed against him as an *involuntary bankrupt*. It provides only that if money is paid, or property is transferred by the bankrupt to an attorney, or counselor or solicitor or proctor, in contemplation of the filing of such petition "*for services to be rendered,*" the "transaction shall be re-examined by the court *on petition* of the trustee, or any creditor, and *shall only be valid* to the extent of a reasonable amount, to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."

Sec. 60d.

It seems to us the statute clearly concedes the right to compensation for services to be rendered with reference either to a voluntary or involuntary petition, and merely reserves to the court the power to reduce the amount the attorney, counselor, solicitor or proctor may have received.

In involuntary cases it is provided that when an application is made to take charge of and hold the property of the alleged bankrupt, or any part of it, prior to an adjudication, the applicant shall file in court a bond, with two sureties, to be approved by the judge, conditioned: (1) In case the petition is dismissed by the court, or withdrawn by the petitioner, for the payment or allowance to

the respondent or respondents, of "all costs, *counsel fees,* expenses and damages occasioned by the seizure, taking, or detention of such property." (2) That such counsel fees, costs, expenses and damages shall be fixed and allowed by the court, and paid by the obligor in the bond.

Bankrupt Law, sec. 3e.

Here it is clearly recognized, that: (1) The involuntary petition may be lawfully defended by the alleged bankrupt; (2) that he may do so through counsel; and (3) that such counsel may be entitled to fees.

The bankrupt law also recognizes attorneys and counselors at law as adjuncts of the court in bankruptcy, by prohibiting referees practicing "as attorneys or counselors at law, in any bankruptcy proceeding."

Sec. 39b.

In providing for the distribution of the assets of the bankrupt, the bankrupt law gives priority to, and provides for the payment in full of the costs of the administration, including "one reasonable attorney's fee for professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow."

Sec. 64b (3).

After providing for the filing of the petition in involuntary bankruptcy, and for process against, and its service upon, the alleged bankrupt, the bankrupt law provides, that the bankrupt may appear and plead to the petition, such pleading if setting up a matter of fact, to be under oath. If the bankrupt controverts the facts alleged in the petition, the costs are to be determined by the judge, or a jury, and the adjudication made, or the petition dismissed.

Bankrupt Law, secs. 18a, 18b, 18c, and 18d.

It may safely be said that the duty to file an answer to each of the involuntary petitions filed against it, was "prescribed" for the Langstaff Hardware Company, in the sense of the law, upon the filing of such petitions and the service of process upon it. The filing of such answer was certainly as fully and specifically "*prescribed*" in the sense of the bankrupt law, as was the *filing* of either one of the involuntary *petitions* by the petitioning creditors.

If it be said the Langstaff Hardware Company *was not* obliged to file an answer, it may be replied that the petitioning creditors *were not obliged* to file any petition. The value of the answer allowed to be filed may be exemplified by the effect of the answer that was filed by the Langstaff Hardware Company in this case. It set out the fact that it had made a general assignment, and upon that admission the district court was enabled at once, and without delay, to make the adjudication of bankruptcy.

Record, p. 27.

However, aside from any provision of the bankrupt law, it was the plain duty of the Langstaff Hardware Company, or of Griffith its assignee, after he became its assignee under the general assignment, to see that no adjudication of bankruptcy was made against it, except upon a petition presenting a case within the jurisdiction of the court, and setting forth with sufficient accuracy a cause of bankruptcy sufficient to support the petition.

See what Wallace, Judge, said *in re* Meyer, 98 Fed. Rep., 980.

It has frequently occurred that petitions in involuntary bankruptcy have been dismissed because they did not set forth sufficient grounds of bankruptcy.

Re Metallic Bedstead Co., 98 Fed. Rep., 981-982.

Re Plotke, 104 Fed. Rep., 964.

Sinsheimer vs. Simonson, *ex parte* Comingor, 107 Fed. Rep., 968.

In the case of the Langstaff Hardware Company, as the Record shows, one of the petitions filed by the petitioning creditors, was abandoned and dismissed.

Record, p. 26-27.

And the petition on which the adjudication was made (Record, p. 5), was attacked in the answer of the Langstaff Hardware Company, for reasons, which if not sufficient to defeat an adjudication upon it, at least deserved some consideration, even on the question of the jurisdiction of the court.

Record, pp. 14-18.

That petition was abandoned, or put aside by the district judge, and never amended, and the adjudication, though made professedly upon it, was, as the adjudication itself shows, based, in addition, upon the answer of the Langstaff Hardware Company to the third petition filed by the Harriman Hoe & Tool Company and others. That petition, and the answer to it, were treated as an intervening petition and answer, in the case of the former petition, and the adjudication based upon such petition and answer.

Manifestly, this was done because there was a possible want of jurisdiction disclosed in the former petition, or else there was not enough in the record of such former case, without supplementing it with the petition and answer in the other case, to authorize or justify or support an adjudication.

Record, p. 27.

If the appellants had to rely exclusively upon the affirmative provisions of the bankrupt law, in order to entitle themselves to compensation for the services charged for, as appears in the Record, we feel safe in saying that

that law, when properly interpreted, will be found to support their claim.

We submit that the very same provision of the statute, which has been called in by the district judge, in order to give compensation to the attorneys filing the involuntary petition against the Langstaff Hardware Company, out of the assets of that company, applies equally to the case of the appellants, and upon a fair construction, entitles them to compensation for their services rendered to the Langstaff Hardware Company, the bankrupt, under the involuntary petitions filed against it.

It may be said that section 64b (3) of the bankrupt law refers the question of the fees of attorneys of the bankrupt, in involuntary cases, to the discretion of the court in bankruptcy. We submit that such discretion extends merely to the reasonableness of the sum to be paid for the fee allowed. We do not understand that the statute goes to the point of authorizing the court arbitrarily, or in the exercise of its unlimited discretion, to refuse any compensation at all. The law declares the compensation shall be made, but requires the amount of it to be reasonable.

THE LAWS OF TENNESSEE ENTITLE THE APPELLANTS TO COMPENSATION, AND GIVE THEM A LIEN THEREFOR ON THE PROPERTY ASSIGNED, AS EXPENSES OF ADMINISTRATION.

The certificate of the Court of Appeals seems to state in substance, that the general assignment made by the Langstaff Hardware Company to Griffith, as assignee, was valid under the laws of Tennessee, and that the claim of the appellants is entitled by that law to be paid as a preferred claim out of the estate of the Langstaff Hardware Company, in the hands of the trustee in bankruptcy, and the only question submitted seems to be whether or not the adjudication of involuntary bankruptcy, within four

months after the making of the assignment, destroyed or defeated the claim.

But, possibly this is not the proper construction of the language of the certificate, and for that reason, we will undertake to show what the law of Tennessee, independently of the bankrupt law, with reference to the claim, is.

The general rule, and the rule in Tennessee, is that the property belonging to a trust must pay the necessary expenses of its administration, and the rule extends to general assignments for the benefit of creditors, and includes attorneys' fees, wherever the services of such attorneys are necessary for the protection, or the proper administration of the trust property. And this is so, whether the instrument creating the trust so provides or not.

Vaccaro vs. Cicalla, 89 Tenn., 64.
Trustees vs. Greenough, 105 U. S., 527..
Woodruff vs. N. Y., L. E. & W. R. R. Co., 129 N. Y., 27.
Perry on Trusts, (1st Edn.), sec. 910.
Burrill on Assignments (6th Edn.), secs. 108-109, p. 147, and sec. 375, p. 518-519.
Meddaugh vs. Wilson, 151 U. S., 333.
Read vs. Memphis Gaslight Co., 107 Tenn., 433.

In the application of the rule, it has been held in Tennessee, that the attorney who prepares a general assignment at the request of the assignor, and after the assignment has been made, at the request, or by the employment of the assignee, renders services and gives advice necessary and proper in the course of his administration, and in the collection and distribution of the assets, including the prosecution and defense of the necessary suits, is entitled to be paid out of the property assigned, or its proceeds, as expenses of administration, and has a lien on such property, for such payment.

Boyd vs. Myers, 12 Lea, 175. .

Douglass vs. The Bank, 97 Tenn., 133.

Rains vs. Rainey, 11 Humphreys, 261.

Daniel vs. Fain, 5 Lea, 258.

Read vs. Memphis Gaslight Co., 107 Tenn., 433.

Burney vs. Atkinson, 54 S. W. Rep., 998.

In Tennessee, attorneys, solicitors and counsel have a lien upon property recovered or protected by their services, which may be declared by order in the cause in which the services are rendered, and the clients cannot, while the suit is pending, so dispose of the subject matter in suit as to deprive the attorney of his lien, nor afterwards to any purchaser with notice. It is a fraud on the attorney, solicitor or counsel, to make any arrangement or compromise, without his knowledge or consent, by which his rights are defeated.

Hunt vs. McClannahan, 1 Heisk., 504.

Perkins vs. Perkins, 9 Heisk., 95. .

Vaughan vs. Vaughan, 12 Heisk., 472.

Covington vs. Bass, 88 Tenn., 496.

Winchester vs. Heiskell, 16 Lea, 556.

Pleasants vs. Kortrecht, 5 Heiskell, 694.

Such lien is superior to a mortgage of a client, properly made during the pendency of the suit, or proceeding, in which the fees accrued.

Covington vs. Bass, 88 Tenn., 496.

Winchester vs. Heiskell, 16 Lea, 55.

The rule giving attorneys and solicitors a lien on the recovery for compensation for services, extends to expenses incurred in rendering the services.

McDougall vs. The Hazleton Tripod Co., 88 Fed. Rep., 218.

In McDonald vs. Railroad, 93 Tenn., 281, it was held that an attorney from whom papers had been taken under

orders and decrees of the court, which he has a right to hold against a railroad company for the payment of his fees, and for money advanced by him, thereby swelling the fund for the payment of creditors of the railroad company, is entitled to be paid out of the funds realized from the sale of the road, the debts for which such papers were held.

And, again, it has been held that a lien of a lawyer on a money judgment or decree in equity, to be paid out of a fund under the control of the court, will be superior to the lien of a subsequent attaching creditor, although his client be nominally a defendant in the cause.

Damron vs. Robertson, 12 Lea, 372.

Carrigan vs. Leatherwood, 3 Shannon's Cases, 38.

The dismissal of a suit in which the services are rendered by the attorney, for which the lien has been acquired, does not affect or impair his right to the lien, nor to its enforcement.

Sharpe vs. Allen, 11 Lea, 518.

It has also been held that a lien for counsel fees attaches to the property recovered in a suit by minority stockholders, who sued to recover corporate property, wrongfully conveyed by the corporate officers under the direction, or at the instance of a majority of the stockholders.

Grant vs. The Lookout Mt. Co., 93 Tenn., 691, and 27 Lawyers' Reps. (Annotated), 98.

With reference to the suit in the Chancery Court of Shelby County, brought to wind up the affairs of the Langstaff Hardware Company as an insolvent corporation, it was the duty of Griffith, as assignee, under the deed of assignment, just as it would have been his duty had he been an assignee or trustee of the Langstaff Hardware Company in bankruptcy, to appear in the suit and defend it. If he had not been named as a defendant to the suit, it was his

duty to appear in the suit and ask to be made a party and allowed to set up his claim to the property embraced in the general assignment. It being necessary for him to defend the suit, it was of course necessary for him to employ counsel or attorneys to make the defense for him.

Chittenden vs. Brewster, 2 Wallace, 191.
Doe vs. Childress, 21 Wallace, 642.
Eyster vs. Gaff, 91 U. S., 521.
Conner vs. Long, 104 U. S., 228, 234-244.
Heath vs. Shaffer, 93 Fed. Rep., 647.
In re Myer, 98 Fed. Rep., 980.
Burrill on Assignments (6 ed'n.), sec. 410, and cases cited, and sec. 351-352.
Meddaugh vs. Wilson, 151 U. S., 333.
Read vs. Memphis Gaslight Co., 107 Tenn., 433.
Memphis & Little Rock R. R. vs. Dow, 120 U. S., 287.

The duty of the assignee, as just stated, grows out of the proposition that he must follow the provisions of the general assignment made to him, and cannot depart from them. He must treat it as valid in all respects until it is set aside. He is protected in what he does under it in good faith, in order to carry out its requirements. He cannot be compelled to refund what he has paid in accordance with its directions, though it may afterwards be judicially decided that such payments should not have been made. And, necessarily, where he makes contracts *bona fide*, or incurs other obligations in executing the duties prescribed for him, the parties dealing with him are protected and secured to the same extent as if the general assignment had been in all respects effectual.

Williams vs. Gibbes, 17 Howard, 239.
In the matter of Lewis, 81 N. Y., 421.
Knower vs. Central Nat. Bank, 124 N. Y., 552.

Young vs. Gillespie, 12 Heisk., 539.

Burrill on Assignments (6 ed'n.), sec. 350, and secs. 410-411.

Wakeman vs. Grover, 4 Paige's Chancery, 24.

Williams vs. Gibbes, 20 Howard, 535.

In re Myer, 98 Fed. Rep., 980, it was objected that the assignee in the general assignment was not entitled to be heard in opposition to the petition for an adjudication of involuntary bankruptcy filed against the maker of the general assignment. In response to the objection, Wallace, Circuit Judge, said: "The other appellant, Sparhawk, the assignee under the general assignment, was certainly entitled to contest the adjudication, as his title may be prejudiced by the proceeding." Here he cited a number of authorities. He then said, further: "The court below permitted the appellants to intervene and be heard, and they have undoubted right to review an adverse decision."

It has been held in Tennessee, and is the law generally, that the attorneys or solicitors prosecuting a suit to wind up the affairs of a corporation or other trust, in which they render valuable services for the benefit of the creditors generally, or others entitled to share, are entitled to be paid out of the fund for such services, and that they have a lien thereon to secure payment.

Moses vs. Ocoee Bank, 1 Lea, 401.

In re Paschall, 10 Wallace, 483.

Cowdry vs. Galveston R. R., 93 U. S., 352.

Central R. R. & Banking Co. vs. Pettus, 113 U. S., 116.

Needles vs. Smith, 87 Fed. Rep., 316, and 32 C. C. A., 226.

Downing vs. Marshall, 37 N. Y., 380, 381, etc.

Wetmore vs. Parker, 52 N. Y., 451, 466, etc.

Memphis & Little Rock R. R. vs. Dow, 120 U. S., 287.

Meddaugh vs. Wilson, 151 U. S., 333.

Read vs. Memphis Gaslight Co., 107 Tenn., 433.

Where the right to payment exists, the lien on the property, or the fund realized by the services, seems to follow as a matter of course.

Thus it was held in Wylie vs. Cox, 15 Howard, 415, that an agreement to allow an agent a per cent of the amount to be recovered under a claim on a foreign government, gives a lien on the fund to that extent; and Congress having provided for suits to try the title to such funds in the treasury, that a court of equity had jurisdiction to enforce the claim.

In Walker vs. Brown, 164 U. S., 664, the court stated the proposition, that if the express intention of the parties was to create an equitable lien upon the property, or the value thereof, or if such intention arises by necessary implication from the terms of the agreement, construed with reference to the situation of the parties at the time of the contract, and by the attendant circumstances, such equitable lien will be enforced by a court of equity against the property in the hands of the party, or a third person who is a volunteer, or has notice.

In that case the court approved the quotation from Pinch vs. Anthony, 8 Allen, 536, in these words: "A party may by express agreement create a charge or claim in the nature of a lien, on real as well as personal property of which he is the owner, or in possession, and equity will establish and enforce such charge or claim, not only against the party who stipulates to give it, but also against third persons who are either volunteers, or who take the estate on which the lien is agreed to be given, with notice of the stipulation."

And see:

Ketchum vs. St. Louis, 101 U. S., 306.

Fourth Street National Bank vs. Yardley, 165 U. S., 635.

In the present case, as the deed of assignment states, and the certificate of the Circuit Court of Appeals shows, the assignment made by the Langstaff Hardware Company provided that the costs and expenses of administering the trust, including "reasonable counsel and attorneys' fees for preparing this deed, and for advice and services to be furnished and rendered him in the course of the administration of the trust hereby created," should be paid by Griffith, the assignee under the general assignment.

Record, p. 43.

The rules of law thus establishing and protecting the rights and remedies of lawyers, for professional services, are, to a large extent, based on the positions they occupy with reference to their clients, and in the administration of the law through the courts. They are a necessity in civilized society, as at present organized, and if they are to perform honestly and efficiently the duties which devolve upon them, under our system, the necessity of providing and paying the requisite compensation for services rendered by them, is manifest.

They are officers of the courts, and are always under a moral, if not a legal obligation, to furnish their advice and services, when a client having a supposed good cause of action, or a supposed good ground of defense, applies to them; and also on any other proper occasion, to render advice and assistance when application is made to them by anyone needing their services. They can be obliged to furnish their services in either the criminal or civil courts, without compensation, or the hope of reward, if those needing them are not able to pay for them. And, in many other respects they are under the control and direction of the courts.

Shannon's Code, sec. 5772-5792 (3965-3980).
Garland *ex parte*, 4 Wallace, 330, 378.
Whelan vs. The Manhattan Ry. Co., 86 Fed. Rep., 219.
Ex parte Bradley, 7 Wallace, 364.
Ex parte Robinson, 19 Wallace, 505.
Ex parte Wall, 107 U. S., 265.
Smith vs. The State, 1 Yerger, 228.
Lawyers' Tax Cases, 8 Heisk., 565.

The citizen, or any individual, or any corporation, has a right, constitutional or statutory, or as a result of the administration of the law, by and through the courts in our government, whenever an appeal to the courts is necessary, or whenever he is called into the courts, with reference to some alleged criminal offense, or some matter of disputed civil right, and on many other occasions, to ask, or even demand the aid, advice and assitance of attorneys and counsel, in order that he may understand what he is entitled to, or what to yield or submit to, and also that he may be informed as to the course he should pursue, or should avoid, in order to recover or maintain his rights.

His resort to the courts would be of little value if he could not have the aid and assistance of attorneys and counsel.

The district judge, in the court below, attached a stigma to the services rendered by the appellants, characterizing such services as rendered "in preparing an illegal instrument," or "in the effort to uphold or execute it." He said that "to allow compensation for such illegal act would be unsound, and contrary to all analogy."

Record, p. 47.

It certainly is not generally understood that the right of an attorney or counsel to compensation from his client for his services rendered such client, depends in any way,

or to any extent, upon the nature or character of the conduct, civil or criminal, of the client, or of any other person, which the attorney is called on to represent, or to justify, or to defend. If the attorney or counsel makes himself a party to a criminal or illegal act, in such sense as to make it his own, of course he would not be entitled to compention for such act. But who ever heard before that the preparing of a general assignment, or advice and services rendered to an assignee in the honest administration of such an assignment, is a criminal or illegal act? Or that the illegality of such an act prohibits the attorney or counsel from receiving any compensation for the services rendered in the preparation of it, or for services rendered in the course of the administration? Are the appellants to be refused compensation because they mistook the law, if they did mistake it, as to the effect of the bankrupt law on a general assignment, or the administration of the assignee under it? It is not pretended that the creditors of the Langstaff Hardware Company, or anyone, has been defrauded, or in any way injured by what was done.

IF THE APPELLANTS HAD A RIGHT TO COMPENSATION FOR THEIR SERVICES UNDER THE STATE LAW WHEN THE PETITION IN BANKRUPTCY WAS FILED, SUCH RIGHT WAS NOT DISPLACED OR IMPAIRED BY THE ADJUDICATION OF BANKRUPTCY.

If the right to compensation, and the lien therefor, existed in favor of the appellants before the Langstaff Hardware Company was adjudicated a bankrupt, such adjudication did not displace their lien, or affect their right to payment out of the property assigned. The bankruptcy, or the adjudication of bankruptcy, could no more relieve or impair the obligations of the Langstaff Hardware Company to the appellants, as its creditors, than the death of

a natural person could relieve his representatives from the payment of his debts out of his assets.

Winchester vs. Heiskell, 16 Lea, 556; 119 U. S., 450, and 120 U. S., 273.

Jeffreys vs. The New York Mutual Life Ins. Co., 110 U. S., 305.

Wylie vs. Cox, 15 Howard, 415.

2 Morawetz on Corporations, secs. 1010 and 1035.

Waite on Insolvent Corporations, secs. 199, 236, 277, 305 and 486.

Burrill on Assignments, (6th Edn.), sec. 349.

Perry on Trusts, (1st Edn.), secs. 231 and 907.

Fewless vs. Keeshan, 88 Fed. Rep., 573.

Kinsey vs. McDearmon, 5 Coldwell, 392.

The bankrupt act provides: "Liens given or accepted in good faith, and not in contemplation of, or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary, in order to impart notice, shall not be affected by this act." Sec. 67d.

The bankrupt act, sec. 70a, provides that the trustee in bankruptcy shall upon his appointment, and qualification, be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, to his assignable assets. The title of the bankrupt, until the trustee qualifies, is therefore not divested.

Conner vs. Long, 104 U. S., 230.

Hampton vs. Rouse, 22 Wallace, 273.

As the trustee is "vested with the title of the bankrupt" and hence takes *no* greater interest in, or better title to, the property than the bankrupt had *at the date of the adjudication*, except *only* as to the property disposed of by the bankrupt, in fraud of the bankrupt law, the trustee can

claim no more than the bankrupt had, and in the same condition in which he had it.

Donaldson vs. Farwell, 93 U. S., 631, 634.
Yeatman vs. The Savings Institution, 95 U. S., 766.
Stewart vs. Platt, 101 U. S., 738, 739.
Porter vs. Lazear, 109 U. S., 586.
Dudley vs. Easton, 104 U. S., 103.
Adams vs. Collier, 122 U. S., 388, 389.
Loveland on Bankruptcy, sec. 149, p. 285.

Taking the title the bankrupt had, the trustee also takes such title subject to *all* equities, liens or encumbrances, whether created *by operation of law*, or by *the act of the bankrupt*, which existed against the property in the hands of the bankrupt, except in cases of judicial liens created against the property within four months preceding the commencement of the proceedings in bankruptcy, and except in cases where the disposition of the property by the bankrupt *is declared* by the law to be fraudulent and void.

Bankrupt Law of 1898, secs. 56b, 67d, 67f and 60b.
Yeatman vs. Savings Institution, 95 U. S., 764, 766.
Jerome vs. McCarter, 94 U. S., 734.
Donaldson vs. Farwell, 93 U. S., 631.
Cook vs. Tullis, 18 Wallace, 332.
Gibson vs. Warden, 14 Wallace, 244.
Stewart vs. Platt, 101 U. S., 731, 738-739.
Hauselt vs. Harrison, 105 U. S., 401, 406-408.
Re Blair, 108 Fed. Rep., 529.
Loveland on Bankruptcy, sec. 149, pp. 285-286.

The assignment of the Langstaff Hardware Company to Griffith, as assignee or trustee, was made on the 13th day of August, 1900.

Record, p. 42.

The Langstaff Hardware Company was adjudicated a bankrupt on the 27th day of September, 1900.

Record, pp. 26-27.

The title of the bankrupt, whatever it may be, remains in him until a trustee is appointed and qualified, and upon his appointment and qualification, the trustee takes only the title of the bankrupt just as the bankrupt held such title.

Bankrupt Act, sec. 70a.

Loveland on Bankruptcy, sec. 149, pp. 283-286.

There is no room for the operation of the doctrine of relation under the very terms of the act itself. But if there was room for the operation of such doctrine, it could not be applied to defeat any right or claim of the appellants in this case, as the courts apply such doctrine *only to subserve the ends of justice*, and to protect parties *deriving their interests* from the claimant, pending the proceedings for the confirmation of his title.

Lynch vs. Bernal, 9 Wallace, 317, 325-326.

It was never claimed in England, when the law of forfeiture was administered there, that in a case of limited forfeiture, anything more than the estate, or right of the person convicted or attainted passed by the forfeiture.

In Burgess vs. Wheat, 1 Eden, 201, the master of the rolls said: "The forfeiture operated like a grant to the king. The crown takes an estate by forfeiture, subject to the engagements and encumbrances of the person forfeiting. The crown holds in this case as a royal trustee, (for the forfeiture itself is sometimes called a royal escheat)."

See also:

Brown vs. Waite, 2 Modern Rep., 133.

The act of Congress of June 17, 1862, forfeiting or confiscating the property of rebels, or public enemies then engaged in war against the national government, did not attempt to do anything more than forfeit or confiscate all the estates and property of the persons designated in the

act. Liens and mortgages were not affected by the confiscation or forfeiture.

Wallach vs. Van Riswick, 92 U. S., 208.
Day vs. Micou, 18 Wallace, 156.
Conrad vs.. Waples, 96 U. S., 279.
Burbank vs. Conrad, 96 U. S., 291..
Avegno vs. Schmidt, 113 U. S., 293..

And see:

Higginson vs. Mein, 4 Cranch, 415.

It was settled at common law that no attainder had relation as to the *mesne* profits of the lands of a person attainted, but only from the time of the attainder. And when a forfeiture of goods and chattels was imposed, and the right to sue given, the property did not, *ipso facto*, vest in the party entitled to the forfeiture by the prohibited act being done, but a proceeding in a court of law must be had, adjudging the forfeiture and declaring the party entitled to the property.

4 Bacon's Abridgement, Title "Forfeiture" (D), pp. 346-347.
Fire Department of N. Y. vs. Kip, 10 Wendell, 266.

At common law, too, it was the rule that the forfeiture of goods and chattels commenced from the time of conviction, and not from the time of committing the fact, as in the forfeiture of real property.

2 Blackstone's Commentaries, *pp. 420-421.
See Semmes vs. U. S., 91 U. S., 21.

Why may not the Langstaff Hardware Company be treated and considered in this case, as having given, and the appellants as having accepted, in good faith, and not in contemplation of, or in fraud of the bankrupt act, the lien given them by the law of Tennessee, on the assets of the Langstaff Hardware Company, as security for compensation for their advice and services rendered, and to be

rendered, as a present consideration, passing at the time of the employment, and in anticipation, in part at least, of the rendition of the services, within the meaning of section 67d of the bankrupt law?

In the condition in which the Langstaff Hardware Company was, could anything be more essential to the preservation of its assets, and the application of them to the payment of its debts, which certainly was its chief duty under the circumstances in which it was placed, than the employment of counsel and attorneys to advise and represent it in what had to be done, in order to preserve those assets, and insure their application?

Of course we are met here, with the proposition of the learned district judge, that the general assignment of the Langstaff Hardware Company, of all its property, for the equal payment of all its debts, was not in aid of the bankrupt law, or for the benefit of the creditors of the Langstaff Hardware Company, but was a fraud upon the bankrupt law .

If this proposition is true, as argued elsewhere, it would not be an answer to the claim for compensation. And we submit no other answer can be made. And we go further, and submit that the authorities show, that the general assignment, instead of being a fraud upon the bankrupt act, is directly in aid of it, and helps to carry out all its provisions.

If the Langstaff Hardware Company had not been a corporation, voluntary bankruptcy would have been an easy, and the proper solution of its difficulties. But being a corporation, voluntary bankruptcy, under the bankrupt act, was not possible. Was it not entitled, under this condition of affairs, to consult counsel, or employ attorneys, and take their advice, and follow their directions as to what was best for it to do? If it was, could counsel

or attorneys be expected to give advice, or render services without being paid for them? And manifestly, unless the Langstaff Hardware Company could bind its assets and property for the payment of the fees it might become liable for, to counsel or attorneys, there would be no way of paying such fees, and no property or assets out of which to pay the same.

And so, we come back to the proposition which we have stated elsewhere, that the Langstaff Hardware Company, before the general assignment was made, had the right to employ counsel or attorneys to give advice and render services, such as the appellants have rendered, and to charge its assets and property, and fix a lien on them, in favor of the counsel or attorneys employed, for the payment of the value of such advice and services. And the employment being once made by the Langstaff Hardware Company, was properly continued by Griffith, the assignee, as the full benefit of the advice and services could not be secured to the creditors, or those entitled to share in the assets and property, except by the extension of the employment of the counsel and attorneys, to the administration of the assets and property, by the assignee, under the general assignment.

II.

The second question certified is: "Is a claim for professional advice and legal services rendered such an assignee, prior to an adjudication of bankruptcy against the assignor, the assignment providing that the costs and expenses of administering the trust should be first paid, entitled to be proven as a preferential claim against the bankrupt estate?"

We deem it unnecessary to discuss this question to any great extent, as we have already presented the proposi-

tion we rely on. That proposition is: that under the general law, a corporation chartered for the purpose of trading, may do anything within the scope of its charter—that is to say, make contracts, and incur obligations, in good faith, and for value, even though it is embarrassed by debt, or is actually insolvent, up to the time of an overt act of bankruptcy or insolvency.

In this case, we contend that the Langstaff Hardware Company had the power, and the right, to employ the appellants as its counsel and attorneys, to perform the services they rendered, and to bind its assets by the contract contained in the general assignment for their payment. And, we insist on this proposition, independently of the other proposition, that the claim of the appellants is to be paid as expenses of administration.

See:

Graham vs. R. R. Co., 102 U. S., 160-161.

Hollins vs. The Brierfield Coal & Iron Co., 150 U. S., 385-386.

Bank vs. L. & M. Co., 91 Tenn., 12.

McClaren vs. The Roller Mill Co., 95 Tenn., 696.

and the other authorities before cited.

III.

The third question certified is: "Is a claim against such an assignee for legal services rendered, and his employment in resisting an adjudication of involuntary bankruptcy against the assignor, allowable as a preferential claim, when the necessary effect of the adjudication would be to set aside the assignment under which the assignee was acting?"

This question, also, has been fully argued in what we have presented above, under the first question certified.

We protest against the expression in the question,

"when the necessary effect of the adjudication would be to set aside the judgment under which the assigne was acting." As already argued, we contend that the adjudication of bankruptcy has no such necessary effect legally. The general assignment remains in full force. The title to the assigned property passed under it. Such title is not disturbed. The assignee in the general assignment is simply displaced, and his title divested. The bankrupt court, upon the adjudication of bankruptcy, simply assumes the administration of the assets under the bankrupt law, which is identical in every respect, and for every purpose, with the general assignment. The trustee in bankruptcy then steps in and takes the place of the assignee under the general assignment, and is vested with his title to the assigned property. Instead of following the requirements of the general assignment in his administration, he simply follows the requirements of the bankrupt law, as interpreted and enforced by the bankrupt court.

The administration of the assets of the debtor is divided into two periods—one, by the assignee under the general assignment up to the date of the adjudication of bankruptcy, and the other by the trustee in bankruptcy after such adjudication, and his qualification. Both administrations are equally effectual and lawful; and persons dealing with the assignee under the general assignment, and with the trustee in bankruptcy, respectively, within the scope of their respective powers, and while they are in possession, are equally protected.

We have already argued that the bankrupt law makes provision for the payment of the counsel or attorneys' fees of the bankrupt, in both voluntary and involuntary cases, out of the assets of the estate. We refer to that argument.

IV.

The fourth question certified is: "If not entitled

to be allowed as preferential claims, may either of the items described in the foregoing questions be proven as unsecured debts of the bankrupt corporation?"

This question has been necessarily argued in what has already been said. We see no distinction between the services rendered in preparing the general assignment, and to Griffith as assignee in the conduct of his administration under the general assignment, after his qualificaiton, and before the adjudication of bankruptcy, and the services rendered in defending the suit in the Chancery Court, brought to administer the Langstaff Hardware Company there, as insolvent, and the services rendered in resisting the adjudications upon the several petitions in involuntary bankruptcy filed against the Langstaff Hardware Company. If there is any distinction in the character of the services, or in the merit of them, we fail to discover it. So far as we can see, they stand on the same basis.

The Langstaff Hardware Company had the right to make the general assignment, and therefore had the right to employ the appellants to prepare it. Griffith, as assignee under the general assignment, having the title to the property, and possession of it, was required to defend such title, and to insist upon, and try to enforce the validity of, and carry out the general assignment. He was necessarily obliged to resist the adjudications upon the involuntary petitions in bankruptcy, because such adjudications would necessarily divest his title, and take the assets, embraced in the general assignment, from his possession. However manifest it may have been to him that he was making an unsuccessful effort in doing what he did, it was his duty to make the effort. If it was, then he had the right to employ the appellants as his attorneys and counsel to represent him, and they are entitled to compensation out of the assets which were in his hands,

and which it was his object and purpose to protect.

He did not go into the courts voluntarily, but was obliged to go there in defense. It certainly was not improper for him to have the rights he represented presented to the court in such form as to give those for whom he was trustee the benefit of the facts on which those rights rested. He could do so only by the employment of counsel and attorneys.

See:

Re Meyer, 98 Fed. Rep., 977.

We append as a part of this brief, the statutes of Tennessee regulating general assignments and their administration.

Respectfully submitted,

WM. M. RANDOLPH,
GEORGE RANDOLPH,
WASSELL RANDOLPH,
For Appellants.

Memphis, Tenn., December 31, 1902.

STATUTES OF TENNESSEE.

CODE OF 1858, SECS. 1974-1978.

Section 1974. Every trustee or assignee to whom property exceeding the value of five hundred dollars is conveyed in trust for the benefit of creditors, sureties or other persons, unless by them released in writing from the obligations hereinafter prescribed, before entering upon the discharge of his duty, shall give bond with two or more good and sufficient sureties, in an amount equal to the

value of the property mentioned in the deed or assignment, payable to the State of Tennessee, conditioned for the faithful performance of all the duties imposed upon him by law, and by the terms of the deed or assignment; and take and subscribe, before the clerk of the county court of the county in which he resides, an oath to the effect: (1) That he will honestly and faithfully execute and perform all the duties imposed upon him by law and by the deed or assignment. (2) That he will cause to be made a full, true and perfect inventory of all and singular the goods, chattels, lands or other assets, contained in said trust deed or assignment, which have or may come into his hands, or into the hands of any other person for him. (3) And that he will return or cause to be filed in the office of the clerk, a full and true account of all the sales of said effects, and of all moneys received or securities taken.

Sec. 1975. The said bond and affidavit shall be filed and preserved by said clerk in his office.

Sec. 1976. Trustees and assignees shall receive five per cent for selling, collecting, and settling estates conveyed in trust.

Sec. 1977. If any trustee or assignee fail or refuse to comply with these provisions, the county court, upon application of any person interested, shall, in the room of the delinquent, appoint a trustee or receiver, who, upon executing the bond and taking the oath aforesaid, may execute the said trust or assignment.

Sec. 1978. The sureties of such trustee or assignee may be released in the manner prescribed in Part 3, Title 2, Chapter 17.

ACTS OF 1859-1860, CHAPTER 34.

Section 1. That Section 1976 of the Code relative to the compensation of trustees, be and the same is hereby repealed: *Provided,* That the county court upon application, or the chancery court, if the trust is administered

in the chancery court, may allow him compensation exceeding the compensation of clerks and masters, if the character of the services rendered entitle him to the same, in the opinion of such court, but which in no case shall exceed five per cent.

Passed February 14, 1860.

ACTS OF TENNESSEE, 1881, CHAPTER 121.

Section 1. That preference of creditors in general assignments of all a debtor's property for the benefit of creditors, shall be illegal and void, and all general assignments shall operate for the benefit of all the debtor's creditors *pro rata*, whether all the creditors are named in the assignment or not. The insertion of a clause in the assignment giving preference shall not render the assignment itself invalid, but the clause only shall be nugatory, and all the debtor's creditors shall share ratably in property assigned.

Sec. 2. That any mortgage, deed in trust, or other conveyance of a portion of a debtor's property for the benefit of any particular creditor or creditors, made within three months preceding a general assignment, and in contemplation of making a general assignment, shall be void in the event a general assignment is made within three months thereafter, and the property conveyed by such conveyance shall be shared ratably by all creditors just as that embraced in the general assignment.

Sec. 3. That any confession of judgment by a debtor, or permitting judgment to be taken by default, or by collusion, within three months preceding a general assignment, and in contemplation of such assignment, shall be void in the event a general assignment shall be made within three months after said judgment.

Sec. 4. That the debtor making a general assignment shall annex thereto a full and complete inventory or sched-

ule under oath of all his property of every description, and that the trustee or assignee shall be entitled to any other property of the debtor not embraced in the assignment, and not exempt from execution, and also to property conveyed in violation of Section 2 of this act, and to the property or its proceeds seized to satisfy judgments rendered in violation of Section 3 of this act.

Sec. 5. That the provisions of this act shall not prevent any person from making a mortgage or deed of trust to secure the payment for property bought or money loaned; *provided,* the mortgage or deed of trust is executed at the time of buying the property or borrowing the money.

Passed April 2, 1881.

ACTS OF 1891, CHAPTER 184.

Section 1. That all trustees under general assignments hereafter made for the benefit of creditors shall give notice by advertisement for four consecutive issues in the nearest newspaper to or within the county within which he is qualified, and by posting at the court house door of said county, for all persons having claims secured by the assignment to present the same to him, taking his receipt therefor, on or before a day fixed in such notice, which day shall not be less than twelve months after the day of notice; and any claims not presented to the trustee on or before the day fixed as aforesaid, or before an appropriation of the trust funds, shall be forever barred both in law and equity.

Sec. 2. That this act take effect from and after its passage, the public welfare requiring it.

Passed March 25, 1891.

ACTS OF TENNESSEE, 1899, CHAPTER 371.

Section 1. That Sections 2731 and 2733 of Milliken & Vertrees' Code, be so amended as to require any trustee or assignee to whom the property has been conveyed in

trust for the benefit of creditors, under the provisions of said sections, to make settlement or cast their accounts with the clerk of the county court of the county in which the deed of trust or assignment was made, as soon after qualification as the nature of the deed or assignment will admit, showing what funds he has received, how he has disposed of the trust property, what expenses he has paid out, and what amount of the funds remain in his hands for payment to beneficiaries under the deed or assignment.

Sec. 2. That, should any such trustee or assignee fail or refuse to make settlement or cast his accounts, as required by the provisions of Section 1 of this act, the clerk of the said court shall be required, upon application of any one interested in the trust property, to issue citation to such trustee or assignee, requiring him to appear before said clerk on a given day and make settlement or cast his account as required by Section 1 of this act, a copy of which citation shall be served by the sheriff or constable of the county, at least five days before the day appointed in the citation for such settlement or casting of account.

Sec. 3. That the clerk of said court, after the expiration of two years from the qualification of such trustee or assignee, shall have power, without application from any one interested in the trust property to compel such trustee or assignee to make settlement or cast his accounts, by citation, as prescribed in Section 2 of this act.

Sec. 4. That any such trustee or assignee, who fails or refuses to settle or cast his accounts, as required by Section 1 of this act, after such citation or notice, shall be guilty of a misdemeanor, and shall be liable to indictment or presentment in the same manner as administrators who fail or refuse to settle as required of them by law.

Sec. 5. That in addition to the foregoing penalties for failure to settle or cast his accounts, the county court

shall have power, and it shall be its duty, upon application, by petition, unless satisfactory reasons be shown why the same should not be done, to revoke the appointment of such trustee and remove him, and appoint another, who shall be subject to the provisions of this act, but in all such proceedings to remove such trustee or assignee he shall have reasonable notice, not less than ten days, of such application and an opportunity to defend same.

Sec. 6. That nothing in this act shall be so construed as to exempt trustees or assignees from qualifying, giving bond and returning inventories as now prescribed by law; nor shall this act be so construed as to make it apply to deeds or mortgages given purely as security for money loaned or advanced, but shall apply alone to conveyances made for the benefit of creditors.

Sec. 7. That the clerk of said court, and the sheriff or constable, for the service performed by them under the provisions of this act, shall be entitled to and be allowed the same fees as are now allowed them by law for like services in other cases.

Sec. 8. That all laws and parts of laws in conflict with this act be, and the same are hereby, repealed.

Passed April 18, 1899.